TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 208.

JARIB L. SANDERSON, SURVIVING PARTNER OF THE FIRM OF BARLOW, SANDERSON & COMPANY, APPELLANT,

vs.

THE UNITED STATES AND THE CHEYENNE TRIBE OR NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 22, 1907.

(20,541.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 576.

JARIB L. SANDERSON, SURVIVING PARTNER OF THE FIRM OF BARLOW, SANDERSON & COMPANY, APPELLANT,

vs.

THE UNITED STATES AND THE CHEYENNE TRIBE OR NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 28, 1907.

1 In the Court of Claims.

No. 2304, Indian Depredation.

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson and Company,

vs.

THE UNITED STATES and THE CHEYENNE INDIANS.

I.—*Petition. Filed June* 8, 1891.

I.

To the Judges of the United States Court of Claims:

Your petitioner, Jarib L. Sanderson, respectfully represents that he is a citizen of the United States and a resident of Boulder, in the State of Colorado.

That in the year 1867, Bradley Barlow, Thomas J. Barnum, and the petitioner were partners in business under the firm name and style of Barlow, Sanderson and Company, owning and operating the Southern Overland Mail and Express Route, between the then terminus of the Union Pacific Railway and the city of Santa Fé, New Mexico, and were then engaged, among other things, in carrying the mails of the United States between those points, and for that purpose,

2 at the time of the committing of the depredations by the tribe of the Cheyenne Indians hereinafter more particularly set forth, were lawfully within the territory of said tribe.

That the said Thomas J. Barnum departed this life about the year 1876, and the said Bradley Barlow departed this life in February, 1890, and the petitioner is the sole surviving partner of said firm, and as such brings this his petition to this honorable Court.

II.

And the petitioner thereupon shows that the said firm, at the time of the committing of the depredations hereinafter specifically set forth, were the owners of the thirty-seven mules and six horses which were taken unlawfully and by force or stealth by the said tribe of Cheyenne Indians from their possession at places on the line of the said mail route and on the days next following—that is to say:

1867.		
May 12th,	at Cimmerron Ranch.....	17 mules.
" 15th,	" Plumb Creek.....	5 mules, 2 horses.
" 25th,	" Pretty Encampment.....	8 mules.
" 25th,	near " "	2 mules.
June 29th,	at Plumb Creek.....	4 mules, 4 horses.
Sept. 20th,	" Coon Creek.....	1 mule.
	In all.....	37 mules, 6 horses.

III.

And the petitioner further shows that the value of each of said animals at the time of the illegal seizure thereof by the said Cheyenne Indians as aforesaid was the sum of two hundred and fifty dollars, and that a claim for damages on account thereof was duly submitted to the investigation of the Secretary of the Interior under the acts of Congress of March, 1885, and May, 1886, and the same was duly investigated by the said Secretary of the Interior and the facts were found by him and reported to Congress on the 7th day of December, 1886, which report of the Secretary of the Interior has never been modified or otherwise changed and still exists among the records of the Congress as well as of the Department of the Interior, and the petitioner respectfully refers to the same and makes the same a part of this petition.

That the said Secretary of the Interior found, as appears in and by said report, that the said firm had a just and equitable claim upon the United States, fixing the value of the animals, however, at the sum of one hundred and eighty dollars each, and recommended the payment of the sum of seven thousand seven hundred and forty dollars thereon.

That while the Secretary of the Interior found that the value of the animals at the time the said depredations were committed was the sum of two hundred and fifty dollars each, as the claimants then averred, and as the petitioner now believes, yet the said Secretary recommended to Congress, as the currency of the country at the time of the taking of the property was depreciated, that the amount due should be ascertained by a comparative reference to the value of the currency at the time of the submission of the claim to him under said acts of Congress, and on this account, and no other, recommended that the sum of two hundred and fifty dollars for each of said animals, which he found to have been their value at the time they were taken, should not be paid, but that the sum of one hundred and eighty dollars for each of said animals only should be paid, which latter sum he estimated to be their value if paid in the currency of the country at the time of his adjudication.

That while the petitioner feels that this construction of the claim of the petitioner was a very grave injustice, and that upon the facts found by the honorable the Secretary of the Interior the value of said animals should have been placed at two hundred and fifty dollars each, still, in view of the extreme age and infirmity of the
3 petitioner, and the delays and expense of prosecuting his claim, the petitioner has decided not to attempt to correct the manifest injustice by electing to re-open the question, but to permit the finding of the honorable Secretary of the Interior to stand, unless the Attorney General shall elect to re-open the case, in which latter event, and only then, the petitioner will insist that he ought to recover the whole sum of ten thousand seven hundred and fifty dollars.

IV.

Your petitioner further states that the said tribe of Indians, at the time said losses occurred, were in amity with the United States; and

the United States has supervisory charge of the said tribe of Indians, and is justly indebted to your petitioner in the said sum of seven thousand seven hundred and forty dollars, according to the report of the said Secretary of the Interior, estimating the value of said property in currency as of the time when the said claim was submitted, or in the sum of ten thousand seven hundred and fifty dollars, if the value of said property be estimated as of the time when the same was illegally taken by the said Cheyenne Indians.

V.

Your petitioner further states that he duly presented his said claim to the Secretary of the Interior for payment, but the same has not been paid, nor has any portion thereof been paid, either to the petitioner or to any member of the said firm of which he is the surviving partner as aforesaid or to any one on their behalf.

VI.

Your petitioner therefore prays that he may have judgment against the United States for the said sum of seven thousand seven hundred and forty dollars or the sum of ten thousand seven hundred and fifty dollars, according to the course which the honorable the Attorney General may elect to pursue in the adjudication of this matter, in pursuance of the act of Congress approved March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations."

JAREB L. SANDERSON,
Surviving Partner,
By A. G. SAFFORD,
Attorney-in-Fact.

DISTRICT OF COLUMBIA, *City of Washington, ss:*

Be it remembered that at the city of Washington, in said District, on this second day of June, A. D. 1891, then personally appeared A. G. Safford, of Washington aforesaid, who, being first duly sworn according to law, on oath says that he is the attorney-in-fact for Jarib L. Sanderson, as surviving partner of the firm of Barlow, Sanderson & Company, and that the matters and things set forth in the foregoing petition by him subscribed are true, as he verily believes.

Witness my hand and notarial seal this 2nd day of June, A. D. 1891.

[SEAL.] MARTIN S. DECKER,
Notary Public for the District of Columbia.

4 II.—*Stipulation and Submission.*

In the Court of Claims.

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surv. Partner of the Firm of Barlow, Sanderson & Co.,

vs.

THE UNITED STATES and THE CHEYENNE TRIBE, BAND, OR NATION OF INDIANS.

Stipulation of Facts in Allowed Claims.

It is hereby stipulated and agreed on the part of claimant in the above-entitled cause by A. G. Safford, Attorney of Record, and on the part of the Government by L. W. Colby, Assistant Attorney General, in charge of Indian Depredation Cases, that the following facts are shown by the original papers, evidence, records, and reports from Governmental Departments on file in the office of the clerk of said Court:

I. That Bradley, Barlow, Jarib L. Sanderson and Thomas J. Barnum, the original claimants was, at the time of the commission of the depredations complained of, a citizen of the United States.

II. That on 12, 15, 25 days of May 1867 and 29 June, 20 Sept. 1867, at or near Kansas certain Indians belonging to the said Cheyenne tribe, band, or nation, took or destroyed property belonging to the said original claimant without just cause or provocation on the part of the owner or agent in charge, and that the same has not been returned or paid for, and was at said time and place of the value of $7,740.00.

III. That the said Cheyenne tribe, band, or nation of Indians were, at the time of the commission of said depredations, in amity and treaty relations with the United States.

IV. That on the 7th day of December, 1886, a claim for said property, so taken or destroyed, was examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the Act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30,
1886, and for other purposes, approved March 3, 1885, and
5 subsequent Indian appropriation acts, in the sum of $7740.00
in favor of said Barlow, Sanderson & Co. and thereafter reported with such allowance to Congress by Executive Document No. 77, of the 2d Session of the 49th Congress of the United States, as Claim No. 749.

V. That * * *

VI. That neither the said claimant nor the United States elects to reopen said case, and try the same before the Court; but the claimant is willing to accept said allowance in full satisfaction and settle-

ment of said claim, and asks to have judgment rendered therefor by said Court under the Act of Congress approved March 3, 1891, entitled "An Act to provide for the adjudication and payment of claims arising from Indian Depredations."

A. G. SAFFORD,
Attorney for Claimant.
L. W. COLBY,
Assistant Attorney General.

And it further appearing that on the 30th of June, 1892, the above case was submitted on the above stipulation of facts by A. G. Safford, for claimant, and L. S. Colby, Assistant Attorney General, for the defendants.
June 30, 1892.

6 III.—*Judgment for Claimant.*

Entered October 11, 1892.

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surviving partner of the Firm of Barlow, Sanderson and Company,
vs.
THE UNITED STATES and THE CHEYENNE TRIBE OR NATION OF INDIANS.

At a Court of Claims held in the City of Washington, on the 11th day of October A. D. 1892, judgment was ordered to be entered up as follows:

The Court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant Jarib L. Sanderson surviving partner of the firm of Barlow Sanderson and Company do have and recover of and from the United States and the Cheyenne Tribe or Nation of Indians, committing the wrong for which this judgment is rendered, the sum of Seven Thousand Seven Hundred and Forty Dollars ($7740) of which sum there is allowed A. G. Safford Esq. the Claimant's Attorney, for prosecuting said Claim, the sum of Five Hundred and Forty Dollars ($540) fixed by the Court according to the provisions of the Act of March 3, 1891, Chapter 538, Section 9 (1, Supplement of Revised Statutes, 2d Edition, pages 915, 916).

BY THE COURT.

7 *Motion for a New Trial under Section* 1088 *of the Revised Statutes Filed by the United States and Allowance of Same.*

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surv. Partner,
vs.
THE UNITED STATES and THE CHEYENNE INDIANS.

Motion for a New Trial on Behalf of the United States.

In this cause, in which judgment was rendered for the claimant in the sum of $7740., on the 11th day of October, 1892, comes the Assistant Attorney General for and on behalf of the United States, and moves the Court for a new trial thereof, in accordance with the provisions of Section 1088 of the Revised Statutes of the United States, for the reason that, in the award of said judgment, wrong and injustice was done to the United States in this, that—

The defendants, the Cheyenne Indians, were not in amity with the United States at the time of the depredations which form the basis of the suit.

CHAS. B. HOWRY,
Assistant Attorney General.

Filed October 6, 1894.

Allowed: By the Court, April 13, 1896.
WILLIAM A. RICHARDSON,
Chief Justice.

8 *Finding of Fact and Conclusion of Law Dismissing Petition.*

Filed April 23, 1906.

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson and Company,
vs.
THE UNITED STATES and THE CHEYENNE INDIANS.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Finding.

At the time of the several depredations alleged in the petition, the defendant Indians were hostile.

Conclusion of Law.

Upon the foregoing finding, the court decides, as a conclusion of law, that the petition be, and the same is hereby, dismissed.

BY THE COURT.

9 *Final Judgment of the Court.*

Entered April 23, 1906.

Indian Depredation, No. 2304.

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson and Company,

vs.

THE UNITED STATES and CHEYENNE TRIBE OR NATION OF INDIANS.

At a Court of Claims held in the City of Washington, on the 23rd day of April, A. D., 1906, judgment was ordered to be entered up as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the petition of the said Jarib L. Sanderson, surviving partner of the firm of Barlow, Sanderson and Company be, and the same is hereby dismissed.

BY THE COURT.

10 *Claimant's Motion for New Trial.*

Filed September 17, 1906.

Comes now the claimant by Ralston and Siddons and William E. Richardson, his attorneys, and moves this Honorable Court to grant a new trial; to vacate the judgment rendered in this cause on the 23rd day of April, A. D. 1906, and to affirm the original judgment herein entered on October 11, 1892. * * *

RALSTON & SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Claimant.

Order of Court Overruling Claimant's Motion for a New Trial.

Entered December 17, 1906.

Order.

The claimant's motion for a New Trial herein is overruled on the authority of the case of Belloeq (13 C. Cls. 195) and the case of McCullum (33 C. Cls., 469).

BY THE COURT.

11 *Application for and Allowance of Appeal to the Supreme Court of the United States.*

Indian Depredations, No. 2304.

JARIB L. SANDERSON, Surviving Partner of Barlow, Sanderson & Company,

vs.

THE UNITED STATES and CHEYENNE TRIBE OF INDIANS.

The claimant, by Ralston and Siddons, his attorneys, respectfully requests that an appeal to the Supreme Court of the United States be allowed from the action of this court in dismissing said case and overruling his motion for new trial.

RALSTON & SIDDONS,
Attorneys of Record.

Filed December 24, 1906.

Ordered, this 24th day of December, 1906, that the above appeal be allowed as prayed for.

BY THE COURT.

12 Court of Claims.

No. 2304, Indian Depredation.

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson and Company,

vs.

THE UNITED STATES and THE CHEYENNE INDIANS.

I John Randolph Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and judgments of the Court, of the motions for new trial and the orders of Court thereon, of the application of claimant for an allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the Seal of the Court of Claims this 17 day of January 1907.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 20,541. Court of Claims. Term No. 576. Jarib L. Sanderson, surviving partner of the firm of Barlow, Sanderson & Company, appellant, *vs.* The United States and The Cheyenne Tribe or Nation of Indians. Filed January 22d, 1907. File No. 20,541.

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 208.

In the Supreme Court of the United States

OCTOBER TERM, 1906

[redacted]

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson & Company, APPELLANT

v.

THE UNITED STATES and the CHEYENNE TRIBE OR NATION OF INDIANS, APPELLEES

Brief for Appellant

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Claimant

12361 GEO. B. HOWARD, PR.

In the Supreme Court of the United States

OCTOBER TERM, 1907

No. 208

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson & Company, APPELLANT

v.

THE UNITED STATES and the CHEYENNE TRIBE OR NATION OF INDIANS, APPELLEES

Brief for Appellant

STATEMENT OF FACTS

This is an appeal by the claimant from a final judgment of the Court of Claims, entered April 23, 1906, dismissing his petition.

In the petition filed in that court on June 8, 1891, under the Indian Depredation Act of March 3, 1891 (26 Stat. L., 851), the claimant states that in the year 1867, Bradley Barlow, Thomas J. Barnum, and the petitioner, as business partners under the firm name of "Barlow, Sanderson &

Company," owned and operated the Southern Overland Mail and Express Route, between the then terminus of the Union Pacific Railway and the City of Santa Fé, N. Mex.; that they were engaged, among other things, in carrying the mails of the United States between these points, and at the time of the depredations by the defendant Cheyenne Indians, were lawfully within the territory of said tribe; that said Barnum and Barlow are both deceased, and the petitioner, now the appellant, prosecutes this suit as sole surviving partner.

The petitioner further states that the defendant Cheyenne Indians, at various times during the summer of 1867, and at various places on their mail and express route, unlawfully and by force or stealth, took from the possession of said firm certain stock, the property of said firm, then and there reasonably worth the sum of ten thousand five hundred and fifty dollars; that a claim for damages on account thereof was duly submitted to the investigation of the Secretary of the Interior, under the acts of Congress of March, 1885, and May, 1886, and that after investigation the said Secretary of the Interior, on December 7, 1886, reported to Congress an award of seven thousand, seven hundred and forty dollars; that no part of said award was paid. The petition further states that the only cause assigned by the Secretary of the Interior for diminishing the amount demanded by the claimant was that the value of the stock in 1867 was enhanced by reason of the depreciation of the national currency at that time, and should be accordingly reduced if paid after such currency had regained its normal value; that petitioner feels that this construction of the law was a grave injustice to him; still, in view of his extreme age and infirmity, and the delays and expenses of prosecuting his suit, he has decided not to reopen the case, but to accept judgment for the award of the Secretary of the Interior, unless the Attorney-General shall elect to reopen the case.

The petition also alleges that said defendant Indians were in amity with the United States at the time of the commission of the depredations, and prays judgment for the sum of seven thousand, seven hundred and forty dollars, awarded by the Interior Department.

On June 30, 1892, more than one year after the claimant had filed his petition and elected to accept the award of the Secretary of the Interior, the Assistant Attorney-General, charged with the defense of Indian Depredation Claims in the Court of Claims, likewise elected to accept this award, and to have judgment rendered therefor, as provided by the Act of March 3, 1891, *supra*, and thereupon the counsel for both parties entered into the stipulation of facts (Rec., pages 3 and 4), reciting that the facts therein agreed to "are shown by the original papers, evidence, records, and reports from governmental departments on file in the office of the clerk of said court."

Among the matters so stipulated are as follows: The value of the property taken by the defendant Indians in the amount awarded by the Secretary of the Interior; that the Indian defendants were, at the time of the commission of said depredations, in amity with the United States; that this claim was duly examined, approved, and allowed by the Secretary of the Interior, under the Act of Congress of March 3, 1885, and subsequent Indian appropriation acts, in the sum of seven thousand, seven hundred and forty dollars, and was so reported to Congress, and that the parties elect not to reopen the case, but to accept judgment for the amount awarded as above stated.

On the same day, June 30, 1892, the case was submitted on the stipulation of facts and election to accept judgment on the award, signed by counsel for claimant and the Assistant Attorney-General, representing the defendants. On October 11, 1892, the Court of Claims entered judgment in favor of the claimant and against the United States and defendant Indians for the sum of seven thousand, seven hundred and forty dollars (Rec., page 5).

On October 6, 1894, one year and three hundred and sixty days after the rendition of the final judgment in favor of the claimant, the Assistant Attorney-General, on behalf of the United States, filed a motion for new trial under Section 1088, of the Revised Statutes of the United States, alleging that "in the award of said judgment, wrong and injustice was done the United States in this, that the defendants, the Cheyenne Indians, were not in amity with the United States at the time of the depredations." No evidence was filed to accompany said motion, but on January 4, 1895, two years and three months after the judgment was entered, one affidavit in support of the motion was filed.

On April 13, 1896, the Court of Claims allowed this motion for new trial.

During the two years succeeding the entry of said judgment on October 11, 1892, the only action taken in this case was the filing of the above motion for new trial in the office of the clerk of said court.

Subsequent to the granting of the motion for new trial, the parties prepared this case for trial, and the same, having been duly submitted and argued, the Court, on April 23, 1906, decided that the defendant Indians were hostile at the time of the several depredations alleged in the petition, and ordered that the petition be dismissed. The claimant, on September 17, 1906, presented his motion to grant a new trial, to vacate the judgment entered on April 23, 1906, and to affirm the original judgment of October 11, 1892, for various reasons reiterated here in the assignment of errors. This motion was overruled by the Court of Claims on December 17, 1906, whereupon the claimant has appealed to this Court.

In view of the fact that the Court made no specific finding of facts upon the question of amity, the contention of the claimant, with relation to that question, can not be submitted to this Court. The present appeal, therefore, is solely directed to the review of certain alleged er-

rors of the Court of Claims in vacating the judgment of October 11, 1892, and dismissing the claimant's petition.

The appellant, therefore, makes the following

ASSIGNMENT OF ERRORS

First. The Court of Claims had no jurisdiction to grant the defendants' motion for a new trial on April 13, 1896, because more than two years had expired after the entry of final judgment on October 11, 1892.

Second. The Court of Claims erred in granting defendants' motion for new trial on April 13, 1896, because the defendants had not presented a proper application for new trial within two years after the entry of final judgment on October 11, 1892.

Third. The Court erred in granting the defendants' motion for new trial because said judgment of October 11, 1892, was entered by consent upon an agreed statement of facts, and upon the election of both parties not to reopen the award of the Secretary of the Interior.

Fourth. The Court erred in allowing the defendants' motion for new trial on April 13, 1896, because the question raised by said motion was a question of law, and not a question of fact, and, therefore, the said judgment became final at the expiration of the term at which it was entered.

Fifth. The Court erred in granting defendants' motion for new trial because in the present suit the defendant Indians were the responsible parties defendant, and the judgment, when entered, was under the terms of the Indian Depredation Act of March 3, 1891, payable out of the funds of said tribe, and the United States had no pecuniary interest or liability in said case, for which reason the provisions of Section 1088 of the Revised Statutes of the United States were not applicable.

Sixth. The Court erred in dismissing claimant's petition on April 23, 1906, because the judgment of October 11, 1892, in so far as the same was against the defendant Chey-

enne Indians, was then a valid and subsisting judgment, and in full force and effect, no proceedings to vacate the same having been instituted.

ARGUMENT

The several assignments of error depend principally upon the interpretation to be placed on Section 1088 of the Revised Statutes of the United States. This statute, which constitutes the sole authority for the Court of Claims to entertain a motion for new trial filed after the expiration of the term at which judgment was entered (In re District of Columbia, 180 U. S., 250; Belknap *v.* U. S., 150 U. S., 588), reads as follows:

> "The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

The first assignment of error presents the question whether the Court had power, under this statute, to vacate a judgment by granting a motion for new trial four years after the judgment was entered. This question relates to the procedure of the Court of Claims in cases coming before it in all of its many subjects of jurisdiction, and the conflict which has existed between the decisions of that court and the frequent expressions of opinion found in the reports of this court render it highly important that the question be authoritatively determined.

That the Supreme Court will review this issue on appeal from final judgment after the motion for new trial has been granted, and that it is only by means of such appeal that this court can act, was settled by the decisions in the case of Young, trustee, *v.* U. S., 94 U. S. (4 Otto), 258, and 95 U. S. (5 Otto), 641.

In that case the claimant sought to review the order granting the defendants' motion for new trial, under Revised Statutes 1088, because of alleged insufficiency in the evidence supporting the motion. In the opinion reported in 95 U. S., 641, Mr. Chief Justice Waite says:

> "The transcript of the record sent here contains the motion of the United States for the new trial and the action of the court thereon, but not the affidavits filed in support of or in opposition to the motion. The appellant now moves for a writ of certiorari to bring here these affidavits, with the papers and documents appended thereto.
>
> * * * * * * *
>
> "When this case was before us at the last term, upon the application for writ of certiorari to bring up the proceedings of the Court of Claims in granting the new trial, it was contended that the court had proceeded 'without jurisdiction, power, or authority;' and, in denying the writ, we said: 'The proceedings under which the new trial was obtained are now part of the record below, and, after judgment is finally rendered, may be brought here by appeal for review.' They are now here, and the record, instead of showing that the court did not have jurisdiction to proceed, shows affirmatively that it had. The motion, as made, brings the case directly within the statute. That being so, the objection as to the jurisdiction of the court, which alone we were then considering, is answered. A case having been made upon the record, such as would justify its

interference, that court had the right to hear the evidence, and decide. Over its decision within that jurisdiction, we have no control, for the statute has not provided an appeal. The new trial is to be granted if the evidence submitted, whether cumulative or otherwise, is sufficient to satisfy that court 'that fraud, wrong, or injustice had been done to the United States.' The act was passed for the protection of the United States. It constitutes one of the conditions which Congress has seen fit to attach to the grant of a right to sue the United States. The suitor can not complain, for he accepted this condition of the jurisdiction when he commenced his suit. If the record showed affirmatively that the Court of Claims had granted a new trial after the term at which the judgment was rendered, under circumstances which gave it no jurisdiction—as, for instance, after the expiration of two years from the final disposition of the claim, or for some cause not within the provisions of the statute—a different case would be made from that which is here now, and one which it will be time enough to consider when it arises. We are all of the opinion that the decision of the Court of Claims, upon a motion by the United States, within the prescribed jurisdiction, is conclusive, and not subject to review. The claimant must rely upon his appeal from the final judgment upon the merits for protection against wrong under this form of proceeding."

Less than four years after the enactment of this statute as section two of the Act of June 25, 1868, it came before this court for construction in the case of *Ex parte* Russell, 13 Wall., 664. While not necessary to the decision of that case, the opinion discusses thoroughly its general purpose and scope. Mr. Justice Bradley, delivering the opinion of the court, states:

> "The section in question was undoubtedly intended to give the Government an advantage, which, in respect to its form, is quite unusual, if not unprecedented, but which Congress undoubtedly saw sufficient reason to confer. It authorizes the Court of Claims, on behalf of the United States, at any time while a suit is pending before or on appeal from said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall satisfy the court that the Government has been defrauded or wronged. The question is: What is meant by the final disposition of the suit from which the two years of limitation is to date? And it seems to us there is hardly room for a doubt. Looking at the words in their collocation with the previous words, it seems evident that the final determination of the suit has reference to its final determination on appeal (if an appeal is taken), or, if none is taken, then to its final determination in the Court of Claims."

The decision of the Court of Claims in overruling claimant's contention is, without expression of opinion by the present court, rested on the authority of the Bellocque Case, 13 C. Cls., 195.

We challenge directly the rule of law enunciated in the Bellocque case. The fundamental error of that decision arises, we believe, from the fact that the court, as is stated in the opinion itself, considered that the statute should be "*interpreted by its own light, without any aid from judicial decisions on the general subject of new trials.*"

The general line of reasoning by which the court there reached its conclusion is as follows:

> "1. The statute does not limit the time within which the defendants must file the motion, therefore, they may lawfully file it at any time within the two years—

"on the last day, or in the last hour, or, as to the matter of that, in the last minute of the second year."

2. "They may file it so late that the court may not be able to act on it within the two-year period; and

3. "To impose on the court an obligation to hear and determine a motion, and at the same time allow the motion to be filed on a day or at an hour when it would be clearly impossible to hear and determine it within the two years, would be too patent an inconsistency to be imputed to the legislative authority."

The opinion then concludes with the statement that:

"As there is no statutory declaration that action upon such a motion shall *not* be taken *after* the expiration of two years, the right to take such action survives the lapse of that period, and it is competent for the court to hear and determine the motion whenever it shall thereafter be properly brought up."

This conclusion manifestly proceeds on the theory that, in the absence of an express statutory prohibition, the Court of Claims may grant a motion for new trial at any time, and that the statute in question, because it employs the term "may grant" within two years does not forbid the granting of the motion *after* that period. But this theory was directly refuted by the opinion delivered by Mr. Justice Brewer, in the case of *Belknap* v. *U. S.*, *supra*. In that case it was declared that the Court of Claims had *no* jurisdiction over the judgment after the term, except as conferred by Revised Statutes, 1088. The opinion states:

"As the new trial was granted at a term subsequent to that at which the original judgment was rendered (the terms of the Court of Claims beginning on the first Monday in December of each year, Rev. Stat., 1052), there would ordinarily be no power in the

> court to grant such new trial. (Cases cited.) But there is a peculiar provision applicable only to the Court of Claims, which is as follows (Revised Statutes, 1088)."

Then, after quoting in full the language of this section, the opinion continues:

> "In order to give full effect to this statute the Court of Claims must have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years."

It is noticeable that although the decision in the Bellocque case would have met completely the contentions of the appellant in the Belknap case, it is nowhere mentioned in the opinion.

In connection with the Bellocque decision, above considered, we invite attention to the report of the decision subsequently rendered on the new trial of the case, reported in 16 C. Cls., 601. This report shows that the claimants, Bellocque, Noblom & Co., were insolvent; that the judgment which was rendered May 18, 1874, was paid in August; that the case was decided on the new trial in 1881; that gross fraud and perjury were found to have been committed; that the claimants did not appear personally or by attorney at the taking of testimony on new trial or at the trial, and that after adjudging the claim a fraud the court decreed that the claimants "be forever barred from prosecuting the same." The efficacy of this decree, when the judgment had been paid seven years previously, is not apparent.

In the Bellocque case (13 C. Cls., 197), the statement that the provisions of Revised Statutes, 1088, were "new and anomalous," was referred to as having been made by the Supreme Court. This language was employed by the

Court in the Ayres case, 9 Wall., 608, but the Court was then considering solely the question of the power given the Court of Claims by the statute to entertain and grant a motion for new trial during the pendency of an appeal, or after the determination of an appeal.

The provision of the statute involved in the Bellocque case and now brought here on appeal—that prescribing the time within which the Court may grant the motion instead of limiting the time for filing the motion—was neither new or anomalous.

By the rule of the common law, the trial court was required to dispose of the motion during the term.

Belknap *v.* U. S., *supra;*
Buckner *v.* Conly, 17 Ky. (1 T. B. M.), 3;
Truett *v.* Legg, 32 Md., 149.

By examination of the judicial systems of many states, it is found that although the majority merely require the motion for new trial to be presented within a limited time, a large number have not fixed any time for the filing of the motion, but have statutes similar to the one under consideration determining the period within which the Court may grant a new trial.

In the case of Vaughn *v.* O'Connor, 12 Nebr., 478, the Court considered the identical question raised here, under a statute which is in every material respect the counterpart of Revised Statutes, 1088. Section 983, of the Nebraska Code of Civil Procedure, provides:

> "It shall be lawful for the justice before whom a cause has been tried on motion, and being satisfied that the verdict was obtained by fraud, partiality, or undue means, at any time within four days after the entering of judgment, to grant a new trial," etc.

The first trial was had in the county court and determined February 14, 1880. A motion for new trial under

the above statute was filed within the four days. Affidavits on the motion were presented by both parties after the four days' period and the case was then presented to the court, the motion being granted. On appeal from the final judgment, on the new trial, the Court said:

> "The question, therefore, depends upon the construction to be given to the section above quoted. The language is:
>
> "'It shall be lawful for the justice * * * at any time within four days after the entering of judgment to grant a new trial,' etc.
>
> "The new trial is to be granted within four days, if at all; the authority of the justice of the peace or county judge to grant a new trial is derived wholly from the statute, and it must be exercised in the manner and within the time limited therein. Cox *v.* Taylor, 6 Nebr., 296; Fox *v.* Meecham, *id.*, 530. The county court had no authority, therefore, on the 8th day of March to set aside a verdict rendered on the 14th day of February."

The appeal was accordingly sustained, and the judgment, which had been erroneously set aside, was ordered reinstated.

In the case of Coopwood *v.* Pruett, 30 Miss., 206, the Court held that the failure to decide a motion for new trial within four months, as required by statute, rendered the subsequent proceedings void. It was held:

> "The new trial must be regarded as never having been granted. Consequently the case was at an end, and the Court had no jurisdiction to proceed to the new trial, which resulted in the judgment now complained of. That result is not affected by the fact that the defendant appeared and defended the suit upon the new trial, and made no objection to the ir-

> regularity of the proceedings. This might create a presumption that he has acquiesced in the irregular act of the judge, but in law it can not give authority and validity to a judicial act which is void for want of power, nor can it confer jurisdiction to take further cognizance of the case or conclude the plaintiff in error from denying the jurisdiction of the Court in proceeding with the new trial."

In the case of James *v.* Appel, 192 U. S., 129, this Court had to construe section 837 of the Arizona Revised Statutes, requiring that motions for new trial "shall be determined at the term of the court at which the motion shall be made." We quote the following language from the opinion delivered by Mr. Justice Holmes:

> "The Arizona par. 837 is copied from a similar section in the Texas Code, act of May 13, 1846, Sec. 112, Hart's Dig. Texas Code, Art. 766, 1 Sayles' Texas Civ. Stat., Art. 1372. Long before its adoption in Arizona the latter section had been construed in Texas as mandatory, and as discharging a motion by operation of law if not acted upon at the same term. It was held to put it out of the power of the Court to postpone the motion for a new trial to the next term, and then to act upon it. If the requirement could be avoided by a continuance, it would be made almost nugatory. McKean *v.* Ziller, 9 Tex., 58; Bullock *v.* Ballew, 9 Tex., 498; Bass *v.* Hays, 38 Tex., 128."

The principal other decisions in the several states having similar statutes upon this subject either requiring the motion to be determined within a fixed number of days, or within the term, or within the next succeeding term after judgment, all of which support the claimant's contention in this case, are as follows:

Ex parte Highland Avenue & Belt R. Co., 105 Ala., 221;
Hundley *v.* Yonge, 69 Ala., 89;
Fitzpatrick's Admr. *v.* Hill, 9 Ala., 783;
Ruff *v.* Hand (Ariz., 1890), 24 Pac., 257;
Walker *v.* Jefferson, 5 Ark., 23;
Redman *v.* Reynolds, 114 Ind., 148;
Crews *v.* Ross, 44 Ind., 481 (487);
Hays *v.* May, 35 Ind., 427;
Ferger *v.* Wesler, 35 Ind., 53;
Buckner *v.* Conly, 17 Ky., 3;
England *v.* Duckworth, 75 S. Car., 309;
Clements *v.* Buckner (Tex., 1904), 80 S. W., 235;
Lightfoot *v.* Wilson, 11 Tex. Civ. App., 151; 32 S. W., 331;
Laird *v.* State, 15 Tex., 317;
McKean *v.* Zillner, 9 Tex., 58.

It can not be said that the appellant waived any rights by proceeding to trial after the granting of the motion for new trial. There was no right of appeal from the order, and it was his duty to participate in the new trial, and bring up this question on appeal from final judgment. U. S. *v.* Young, 94 U. S., 258.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, we contend that should this Court decide that it was necessary for the Court of Claims to act on the motion for new trial within two years, the appeal should be sustained because there was no legal application for new trial under Sec. 1088 of the Revised Statutes, presented within the two years.

The statute contemplates the offering of evidence. All that was done in this case was the filing of a motion merely stating that the Indian defendants were not in amity. it

was not specified in what particular the evidence at the former trial was rebutted or impeached.

The necessity for the submission of evidence as a basis for the action of the Court in granting such a motion was held by this Court in *ex parte* District of Columbia, 180 U. S., 250, adopting the decision of Judge Nott on the same question in Ealer's Case, 5 C. Cls., 708.

At no time within the two years' period—a period "of limitation," so designated by Mr. Justice Bradley, in *ex parte* Russell, quoted *supra*—had the defendants presented an application for new trial which the Court, had it been so inclined, had jurisdiction to allow under Sec. 1088.

THIRD ASSIGNMENT OF ERROR

The claimant further contends that the election of the parties not to reopen the award of the Secretary of the Interior, when merged into the judgment of October 11, 1892, was a final conclusion of the suit, except in so far as questions of fraud may be concerned.

Section 4, of the Indian Depredation Act, of March 3, 1891, is, in part, in the following words:

> "That all unpaid claims which have heretofore been examined, approved and allowed by the Secretary of the Interior, or under his direction, in pursuance of the Act of Congress * * * approved March 3, 1885, and subsequent Indian appropriation acts, shall have priority of consideration by said Court, and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case, and try the same before the Court." (26 Stat. L., 851.)

In a case submitted to the Court for judgment under this section, the only facts into which inquiry can be made, in the absence of fraud, are (1) whether it is an unpaid

claim; (2) whether it has been examined, approved and allowed by or under the direction of the Secretary; (3) the amount found due; and (4) that the parties elect not to reopen the award of the Secretary. Having found these facts, and there is no question that all exist in the present case, the mandatory duty of the Court is to enter judgment for the amount of the award.

The duty is imposed upon the Assistant Attorney General defending the case to satisfy himself that the award was proper; that the evidence he examines and the result of his investigations convince him of the liability of the defendants. He is permitted by the statute to act in a quasi-judicial capacity. As was said of the Court's action in the premises by Judge Weldon in the case of Hyne *v.* U. S., 27 C. Cls., 113:

> "Counsel representing both parties have, by the terms of the stipulation, signified the unwillingness of both to disturb the finding of the Secretary of the Interior Department, and upon that condition, the Court is by the terms of the statute compelled to render a judgment for the claimant in the sum adjudicated to be due by the action of the Secretary. The finding and allowance of the Interior Department, unless disputed by the claimant or the United States, becomes in this court an award, upon which it is the duty of the Court to render a judgment, affirming to the claimant the amount allowed by the action of the Department. We determine no question of law applicable to the original controversy, all differences in fact and in law become merged in the determination of the Secretary in the allowance of the amount which he finds due the claimant."

The effect, therefore, of the action of the Court was not to grant a new trial of any issue previously heard or determined by it, but to review, on the motion of one As-

sistant Attorney General, the action of his predecessor in office, without having means of knowing what evidence he had before him when he decided to accept the Secretary's award.

A motion for new trial on questions of fact, and a motion under Sec. 1088 of the Revised Statutes can only be based on errors of fact, is always addressed to the discretion of the Court. Can it be considered that Congress intended to permit the Court to review on such a motion matters entrusted by law to the discretion of an attorney—matters into which at the time of rendering judgment it, the Court, had no authority or power to inquire.

The matter alleged as error in the motion—the non-amity of the defendant Indians—was not jurisdictional. Upon this point we need only refer to the following decisions of this Court:

In the case of Leighton *v.* U. S. (29 C. C., 288; 161 U. S., 291), the claim had been allowed by the Secretary of the Interior, although the tribe was not in amity, and no treaty authorized payment for depredations. The Court of Claims held that amity was jurisdictional under the second paragraph of Section 1 of the Act. (Nott and Davis, J. J., dissenting.) The Supreme Court, however, in a unanimous opinion affirming the judgment of the Court of Claims, rests its decision wholly upon the fact that the claimant had elected to reopen the case, and after deciding that the claim can not be sustained under the first jurisdictional clause for want of amity, or under the second for absence of treaty providing for payment, concludes:

> "It follows, therefore, that though, under the terms of the second jurisdictional clause, the Court of Claims had jurisdiction over this claim, yet, the case having been reopened by the claimant, the Court of Claims properly proceeded to inquire into its merits, and correctly found that there was no law or treaty upon which to base a liability of either the United States or the Indians."

The difference between the Leighton case and the present case is primarily that in the one at bar neither party has elected to reopen the case, but both parties have expressly accepted the findings of the Secretary on the questions which are so declared by the Supreme Court to be questions of liability—not jurisdiction—and the Court has entered judgment for the amount fixed as the extent of that liability.

That amity is not jurisdictional or in all cases material to be proved in allowed claims under the second jurisdictional clause of Section 1 of the Act, will further appear by reference to the cases of Marks *v.* U. S. et al., 161 U. S., 297; and Johnson *v.* U. S., 160 U. S., 546.

In Price *v.* U. S., 174 U. S., 373, the Court states:

> "The conclusions of the Secretary, both as to *liability* and amount, were placed before the Court for consideration by the election of the defendants to reopen the case."

FOURTH ASSIGNMENT OF ERROR

This assignment charges error in allowing the motion filed after the term at which judgment was entered for a cause not authorized by Sec. 1088 of the Revised Statutes, in that the error alleged was an error of law, not of fact.

The Court has no jurisdiction under this section to consider errors of law.

In re District of Columbia, 180 U. S., 250.

Until the decision of the Marks Case, 28 C. Cls., 171, the Court of Claims had adopted the prior ruling of the Interior Department in determining these claims that the existence of treaty relations with the Indian defendants was equivalent in law to "amity." Such was the law as construed at the time the judgment of October 11, 1892, was rendered, and the existence of treaties with the

Cheyenne Indians fully satisfied the requirements of the Court.

Section 1 of the Act of March 3, 1891, reads in part as follows:

> "First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.
>
> "Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department."

The Marks decision, rendered February 27, 1893, expressly limits the effect of this ruling to cases coming before the Court under the first jurisdictional clause of Section 1 of the Act. It was not until the decision in the Leighton Case, 29 C. Cls., 288, rendered May 29, 1894, that the Court extended the rule to "allowed" cases under the second clause of Section 1. Shortly after the Leighton decision was announced, the motion for new trial was filed in the present case, not because facts could be then established which could not have been established before the judgment was rendered, but to take advantage of the changed construction of the law.

This might have been possible if the application had been seasonably presented at the term at which the judgment was entered, but we submit that it is not within the jurisdiction conferred by Sec. 1088 of the Revised Statutes.

FIFTH ASSIGNMENT OF ERROR

Claimant's contention under this assignment of error is that the alleged wrong or injustice, if any, affected the Indian defendants, and not the United States, and the mo-

tion could not be allowed under Revised Statutes, 1088. The language of this section expressly provides for the granting of a motion for new trial "on motion on behalf *of the United States,*" upon such evidence as shall satisfy the Court "that any fraud, wrong, or injustice in the premises has been done *to the United States.*" At the time this statute was passed the United States were, as they are now, under the general jurisdiction of the Court, the sole defendants in cases pending in the Court of Claims. When Congress provided for the adjudication of the District of Columbia claims by that Court, it provided that motions for new trial should be filed within twenty days, and the Court, in construing that provision, has held that all motions for new trial must be filed within twenty days, although on appeal to the Supreme Court, that question was not decided. (180 U. S., 250.)

There is no provision whatever in the Indian Depredation Act which creates directly or indirectly any special rights of claimants or defendants in respect to new trials, so that the principles of general law applicable thereto must necessarily govern. As was held by the Court of Claims in the case of McCollum *v.* U. S., and Rogue River Indians, 33 Ct. Clms., 469, a motion filed after the term under these circumstances must necessarily be considered under the provision of section 1088.

In this case, the Indian defendants are identified and had, and now have, annuities payable to them more than sufficient to satisfy the judgment rendered October 11, 1892. (Appropriation under Sec. 15, Act of March 3, 1891, Ch. 543—Established trust fund of $1,000,000 for Cheyenne and Arapahoe tribes jointly and annuity of $50,000.)

Concerning the liability of the United States, under the Indian Depredation Act, Chief Justice Nott, in the case of Love, administrator, *v.* United States, summarized the conclusions, in which the Court agreed, as follows:

"1. The Indian Depredation Act is jurisdictional; it does not create liabilities, nor assume them further than this, that where a depredation is shown to have been committed by Indians, but their tribes can not be identified with sufficient certainty to be charged with the loss, or where a tribe is without funds to satisfy a judgment, the United States assume the Indians' liability. But the jurisdiction intended by the act is commensurate with and includes all legal liabilities of Indian defendants for depredations committed on citizens.

"2. The only liabilities contemplated by the act (apart from the above, which are in the nature of guaranties), are those of Indians. The Act 28th February, 1859 (11 Stat. L., p. 388, Sec. 8), rescinded all liabilities on the part of the United States." (29 Ct. Cls., 347.)

Construing the terms fraud, wrong, or injustice in their commonly accepted and legal significance, the question to be determined is whether the existence of fraud, wrong, or injustice to the United States can occur in the absence of any responsibility or liability on the part of the United States to pay the judgment complained of out of its own funds. We need not consider at this time the reasonings which led the Court of Claims to construe the Act of March 3, 1891, as merely conferring the jurisdiction to settle claims, the liability for which had theretofore existed. It has been uniformly held that such is the proper construction of the act. We contend, therefore, that, in order to give the court jurisdiction to act upon a motion for new trial filed after the term, under the provision of section 1088, the case must be one in which the United States are liable to pay the judgment with the public funds.

There may be cases where fraud, wrong, or injustice is done the Indian defendants, but it is not to be supposed that they are without relief. They have all rights ordinar-

ily accorded litigants in courts of law, but do not, we contend, have the unusual advantage of additional time reserved to the United States in certain cases by section 1088 of the Revised Statutes.

The identification of the Indian defendants, in a case where the tribe so identified has annuities, is in effect the discharge of the United States from all interest in a suit under the Act of March 3, 1891. As decided by the Love case, *supra,* the only liability in any event is secondary—that of a guarantor.

SIXTH ASSIGNMENT OF ERROR

The question presented under this assignment of error concerns only the liability of the Indian defendants.

The motion for new trial was filed solely in behalf of the United States, one of the two defendants, on the ground that wrong and injustice had been done *the United States* in the rendition of judgment. In fact, under Revised Statutes, Sec. 1088, any motion embracing both defendants would have been unauthorized.

This motion was granted, the order of the Court being evidenced merely by the endorsement of the word "allowed" on the back of the motion.

It is well settled by the weight of authority that a motion for new trial may be allowed on behalf of one of several defendants, without disturbing the verdict or judgment as to the other defendants. In the case of Albright *v.* M'Tighe, 49 Fed. Rep., 817 (820), it is said:

> "The real question is, what is the effect of this error as to one joint wrongdoer upon the verdict rendered jointly against all? Upon this question there is a conflict of authority, the older cases, and perhaps some modern ones, holding that one of several defendants in an action of tort can not be awarded another trial

unless all are. Bond *v.* Sparks, 12 Mod., 275; Parker *v.* Godin, 2 Strange, 813; Doe de Dudgeon *v.* Martin, 13 M. & W., 810; and note *a*, 2 Tidd., Pr. 911.

"The better doctrine is, however, otherwise, as the cases abundantly show; and while some of them endeavor to establish distinctions from the old rule, others boldly repudiate it or ignore it altogether."

For the decisions on this question, see the following cases:

Houston *v.* Bruner, 39 Ind., 376;
Terfenning *v.* Gallup, 8 Iowa, 74;
Bicknell *v.* Dorion, 16 Pick., 478;
Brown *v.* Burruss, 8 Mo., 26;
Bremen Bank *v.* Unnath, 55 Mo. App., 43;
People *v.* N. Y. Com. Pleas, 19 Wend., 118;
Heffner *v.* Moyst, 40 Ohio St., 112;
Union Bank *v.* McClung, 28 Tenn. (9 Humph.), 98;
Roberts *v.* Heffner, 19 Tex., 129;
Boswell *v.* Jones, 1 Wash., 322;
Price *v.* Harriss, 25 E. C. L., 159; 10 Bing., 331.

Such being the general rule, it remains to determine whether there is anything peculiar to the determination of Indian depredation claims by the Court of Claims preventing its application to the present case.

Section 4 of the Act of March 3, 1891, 26 Stat., 851, directs the Attorney General "to file a notice of any counter-claim, set-off, claim of damages, demand or defense whatsoever of the Government or of the Indians in the premises."

The second proviso to that section authorizes the Indians to appear and defend by their own attorney if they shall choose to do so.

Section 5 directs the Court to:

> "Render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified."

Section 6 then provides:

> "That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by the members of which, the Court shall find that the depredation was committed, and shall be deducted and paid in the following manner:
>
> "First, from annuities due said tribe from the United States;
>
> "Second, * * *"

Section 10 authorizes an appeal by "the claimant, or the United States, or the tribe of Indians."

The two defendants may, therefore, sever in their pleadings or defense to the action. The United States may plead a set-off or counter-claim; the tribe may plead their innocence of the depredation and the Court may find, under Section 5, that the identity of the Indian depredators can not be ascertained, and render judgment only against the United States.

Either defendant may feel aggrieved at the judgment and take an appeal to this Court.

We submit, therefore, that, as the defendant Indian tribe did not see fit to apply for a new trial, or appeal from the judgment of October 11, 1892, and the United States applied for a new trial only in its own behalf, the judgment, in so far as the liability of the tribe was fixed by that judg-

ment, remained unaffected by the granting of the motion on April 13, 1896, and it was error in the Court of Claims to dismiss the petition as to both defendants on April 23, 1906.

Respectfully submitted,

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Claimant.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

JARIB L. SANDERSON, SURVIVING PARTNER of the firm of Barlow, Sanderson & Co., appellant,
v.
THE UNITED STATES AND THE CHEYENNE tribe or nation of Indians.
} No. 208.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

STATEMENT OF CASE.

Judgment in this case was rendered by the Court of Claims in the sum of $7,740 in favor of the appellant and against the United States and the Cheyenne Indians, under the Indian depredation act of March 3, 1891 (26 Stat., 851). The petition alleged certain depredations committed upon the appellant's property by Indians belonging to the Cheyenne tribe at various times in the year 1867. Within two years from the date of the judgment the Attorney-General, acting under the direction of Congress, filed a motion

for new trial under the provisions of section 1088, Revised Statutes, on the ground that fraud, wrong, or injustice had been done to the United States in the rendition of such judgment. This motion was not acted upon by the Court of Claims until after the expiration of more than two years from the time when the judgment was entered. The motion, being then argued and submitted upon its merits, was allowed by the court; and the cause afterward proceeding to trial, the court found that the defendant Indians were not in amity with the United States at the date of the depredations alleged, and dismissed the petition. The claimant thereupon appealed to this court, alleging error in the allowance of the motion for new trial.

The question involved, the power of the Court of Claims to allow a motion for new trial under section 1088, Revised Statutes, of course applies not only to the case at bar but to all cases of which the Court of Claims has jurisdiction; and it affects directly a large number of Indian depredation cases that are in the same attitude as the case at bar.

APPELLANT'S FIRST ASSIGNMENT OF ERROR.

The appellant's first and chief assignment of error is that the Court of Claims had no jurisdiction to grant the defendants' motion for new trial, because more than two years had expired after the entry of final judgment.

The statutes giving authority to file a motion for new trial after the expiration of the term at which

judgment was rendered are section 1088, Revised Statutes:

> The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law;

and the act of Congress approved August 23, 1894 (28 Stat., 476). This act, after making appropriation to pay the judgments of the Court of Claims in this and 258 other Indian depredation cases, provides:

> That no one of the said judgments shall be paid until the Attorney-General shall have certified to the Secretary of the Treasury that he has caused to be examined the evidence heretofore presented to the Court of Claims in support of said judgment and such other pertinent evidence as he shall be able to procure as to whether fraud, wrong, or injustice has been done to the United States, or whether exorbitant sums have been allowed, and finds upon such evidence no grounds sufficient in his opinion to support a new trial of said case; or until there shall have been filed with said

> Secretary a duly certified transcript of the proceedings of the Court of Claims denying the motion made by the Attorney-General for a new trial in any one of said judgments.

The Attorney-General thereupon examined the evidence and filed motions for new trial in 172 cases. The motions were allowed in 77 cases and overruled in 49 cases, the remainder having been withdrawn. All the motions were filed within two years from the date of judgment, *but none of them was acted upon by the Court of Claims within that period.*

Several of the judgments affected by this statute, including the one in the case at bar, were rendered by the Court of Claims on October 11, 1892. One year, ten months, and twelve days of the two years allowed by the statute had elapsed when this legislative direction was given. The motions were filed in time, but the Court of Claims was not in session when the statute was passed nor when the motions were filed. It did not convene after the summer vacation until October 22, at which date more than two years had elapsed since the rendition of the judgment.

The Court of Claims in its ordinary jurisdiction may allow a motion for new trial more than two years after judgment.

There is no statutory limit to the power of the Court of Claims in respect to the granting of new trials. It derives that power from its constitution as a court of record. A rule of the court (Rule 107) requires a motion for new trial to be made at the term in which

the judgment is rendered. When such a motion has been filed, the court may act upon it when it is reached and submitted for decision.

The appellant maintains the contrary of this latter proposition, and cites the dictum in the case of *Belknap* v. *The United States* (150 U. S., 588); but the learned justice who used the language cited in that case did not mean to say that the court would not ordinarily have power to grant a motion after the term, but that it would not ordinarily have power to grant a motion *filed* after the term. This is conclusively shown by the authorities which he cites: *Coughlin* v. *The District of Columbia*, 106 U. S., 7; and *Brooks* v. *R. R. Co.*, 102 U. S., 107.

The learned counsel for the appellant also assumes as a basis for his argument the proposition that by the rule of the common law the trial court was required to dispose of the motion during the term. This proposition we can not assent to, and the authorities cited by him do not sustain it. There is no authority for it in *Belknap* v. *The United States* (*supra*), although the syllabus of that case states the proposition. *Truett* v. *Legg* (32 Md., 149), also cited by him, not only fails to support his proposition but is directly against it. In that case the motion for new trial was filed during the term but was not prosecuted during that term nor for several successive terms thereafter. Finally the court below allowed the motion, and on appeal the Supreme Court of the State affirmed the judgment, holding

that a motion for new trial does not expire with the term of court at which it is made, and that until it is disposed of further proceedings in the case are suspended.

Neither does *Buckner* v. *Conly* (1 B. Mon., 3) support the appellant's contention, although in that case it was held that the court could not act on a motion at a subsequent term unless the court had done some act to suspend the judgment and continue the case. With that condition, the court expressly recognized the power of the trial court to grant a motion at a subsequent term.

In chancery a petition for rehearing is too late if *filed* after the term; but a bill of review based on error of law or newly discoverd evidence may even then be filed. (*Clapp* v. *Thaxter*, 7 Gray (Mass.), 384; *Thompson* v. *Goulding*, 5 Allen, 81.)

In the common law courts the rule required a motion for new trial to be filed before the judgment was perfected. This meant, ordinarily, within the first four days of the term succeeding the trial. (*Birt* v. *Barlow*, 1 Doug., 171; *Rex* v. *Hayes*, 2 Stra., 842; *Rex* v. *Bell*, 2 Stra., 995; *Graddy* v. *Hightower*, 1 Ga., 252; *Jackson* v. *Chace*, 15 Johns. (N. Y.), 354.) But no limit appears to have been imposed upon the power of the court to hear such motions after the term, or at any time.

In the absence of statutory regulation, the time for filing motions for new trial is fixed by the rule of the court; and it is generally held that a motion is in

time if filed at the term when judgment was rendered, although in extraordinary cases the court may allow it to be filed at a later term; and that when once filed the court may hear and determine the motion at its pleasure and at the convenience of the parties.

Graddy v. *Hightower*, 1 Ga., 252.
Conklin v. *Hinds*, 16 Minn., 457.
Felton v. *Spiro*, 78 Fed., 576.
Johnston v. *Simmons*, 77 Ga., 298.
King v. *Carey*, 5 Ga., 270.
Pace v. *Nealing*, 21 Ga., 464.
State v. *First National Bank*, 4 Nev., 358.
Constantine v. *Foster*, 57 Ill., 36.
Hearson v. *Graudine*, 87 Ill., 115.

Citations to this effect could be multiplied, but it is unnecessary. There can be no doubt that the practice of the courts of this country overwhelmingly sustains the proposition that when jurisdiction is acquired by the court over a motion for new trial filed in time, such jurisdiction continues until the motion is acted upon. In actual practice for a long series of years, the Court of Claims has followed this rule. Cases in which motions for new trial have been allowed after the term, and in some cases several years after, are here referred to.

Grantham v. *United States*, 28 C. Cls. R., 528.
Gorham v. *United States*, 29 C. Cls. R., 97.
Graham v. *United States*, 30 C. Cls. R., 318.
Valencia v. *United States*, 31 C. Cls. R., 388.
Coe et al. v. *United States*, 31 C. Cls. R., 441.
Trabing v. *United States*, 32 C. Cls. R., 440.

Litchfield v. *United States*, 32 C. Cls. R., 585, and 33 C. Cls. R., 203.

McCollum v. *United States*, 33 C. Cls. R., 469.

Rhine v. *United States*, 33 C. Cls. R., 481.

Jaeger v. *United States*, 33 C. Cls. R., 214.

Contzen v. *United States*, 33 C. Cls. R., 475.

Potter v. *United States*, 34 C. Cls. R., 13.

Vaughn v. *United States*, 34 C. Cls. R., 342.

Rush v. *United States*, 35 C. Cls. R., 223, and 33 C. Cls. R., 417.

Jones v. *United States*, 35 C. Cls. R., 36.

Collins et al. v. *United States*, 35 C. Cls. R., 122.

Ship Parkman, 35 C. Cls. R., 406.

De Baca v. *United States*, 36 C. Cls. R., 407.

Pino v. *United States*, 38 C. Cls. R., 64.

McCoy v. *United States*, 38 C. Cls. R., 163.

Butler v. *United States*, 38 C. Cls. R., 167.

Anthracite Mesa Co. v. *United States*, 38 C. Cls. R., 56.

Summey v. *United States*, 39 C. Cls. R., 199.

Murphy v. *United States*, 39 C. Cls. R., 178; 38 C. Cls. R., 511.

Brig Lucy, 39 C. Cls. R., 221; 37 C. Cls. R., 97.

Le More & Co. v. *United States*, 39 C. Cls. R., 484.

Schooner Atlantic, 39 C. Cls. R., 193; 37 C. Cls. R., 17.

Burnham v. *United States*, 40 C. Cls. R., 166.

Brig Juno, 41 C. Cls. R., 106; 36 C. Cls. R., 239.

Brown v. *United States*, 41 C. Cls. R., 275.

An apology is perhaps due to the court for presenting at such length a proposition that is so clear. The excuse for doing so must be found in the appellant's apparently serious contention and his reliance upon the opinion of this court in *Belknap* v. *The United States.*

Section 1088, Revised Statutes, extends the time for filing motions for new trial and does not limit the time within which the court must consider them.

The Court of Claims has directly held in a well-considered opinion handed down more than thirty years ago that it has power to allow a motion under this statute after the expiration of more than two years from the date of the judgment, if the motion was filed in time. (*Bellocque* v. *The United States,* 13 C. Cls. R., 195.)

It has followed that decision in the following reported cases, and in many others not reported:

Graham v. *The United States,* 30 C. Cls. R., 318.

Valencia v. *The United States,* 31 C. Cls. R., 388.

Coe et al v. *The United States,* 31 C. Cls. R., 441.

Trabing v. *The United States,* 32 C. Cls. R., 440.

Litchfield v. *The United States,* 32 C. Cls. R., 585, and 33 C. Cls. R., 203.

McCollum v. *The United States,* 33 C. Cls. R., 469.

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The decision in the *Bellocque* case has been regarded as settled law in the Court of Claims since 1877 and has never before been questioned. It has been followed, as we have seen, in at least 126 cases.

We have shown that a motion filed during the term may be heard by the Court of Claims after the expiration of more than two years. What, then, did Congress intend by the enactment of section 1088, Revised Statutes? This court has said that the statute was passed for the protection of the United States (*Young* v. *United States*, 95 U. S. 641), and that it was undoubtedly intended to give the Government an unusual, if not unprecedented, advantage (*Ex parte Russell*, 13 Wall., 668). The only way in which the statute gives the Government any advantage is by giving additional time in which a motion for new trial may be filed by the United States. If it does not accomplish this it does not accomplish anything. If it does not extend the time within which the defendants may file their motion it is so much waste paper; for it certainly does not extend the time within which the court may allow the motion.

The statute, then, it must be conceded, removes, as to the United States, the requirement that a motion for new trial must be filed within the term at which judgment was rendered. It extends the time within which the counsel for the United States may file his motion.

How far does the statute extend this time? Within what time must the United States take advantage

of the statute? There can be but one answer to that question. The statute names but one limit, and that limit, as we have seen, must necessarily apply to the filing of the motion. The motion may, therefore, be filed at any time within two years after the rendition of the judgment. It may be filed on the last day of the second year; it may be filed on the last hour of that day, and in the last minute of the last hour.

This proposition established, the assignment of error must fail. For it can not seriously be contended that the statute permits the filing of a motion for new trial and also requires the court to act upon that motion within the same instant. Such a construction would be absurd; and there is no escape from it if the contention of the appellant prevails. It can not be that the counsel for the United States must agree with the court on a division of the time limit fixed by the statute; it can not be that he is required at his peril to estimate the time that the court may take in deciding the motion. Must he allow the court three months' time or a week? Must he take into account the periods of vacation, when the court is not in session? Assuming that such a motion may be allowed in vacation, must he inform himself of the whereabouts of the Chief Justice, consider the time necessary to reach him and the time required by him for deliberation, and curtail the statutory period by so much in order to enable the court to act upon the motion within that period? Suppose the grounds for new trial do not come to the knowl-

edge of the Attorney-General until the last day of the two years; suppose the court desires argument on the questions involved before passing upon the motion; suppose the court desires more time for deliberation than the Government's counsel has estimated; must the motion fail for these reasons? The construction contended for would deny the court the right to have additional light upon the case. It would limit the time within which the motion might be considered to an hour, to a minute perhaps, or to an infinitesimal division of an instant of time. It is inconceivable that such was the intention of Congress.

Again, the state of the calendar would have to be considered. A motion for new trial, like other business before the court, must await its turn. The time of the court may be so fully occupied with cases of equal urgency that a motion can not be heard immediately. To say that in such circumstances the motion must fail would be an arbitrary denial of justice.

A rule of the Court of Claims provides that all motions which have been on the calendar for more than two years may be submitted on motion of either party (Rule 93). No method is provided for a submission before that time by the moving party alone. If the appellant's contention here be upheld, the opposing party might in any case defeat the jurisdiction of the court by delaying the hearing of the motion until after the time had expired. The construction

contended for by the appellant would deny to the defendants rights under section 1088 equal to those that they have under the ordinary jurisdiction of the court. Instead of being an advantage, it would be a disadvantage.

The statute should be liberally construed in favor of the Government. This court has said that "before any judgment should be rendered binding the United States, it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate." (*Leighton* v. *The United States*, 161 U. S., 291, 297.)

The statute not mandatory.

It is not necessary, in order to reach the conclusion we have reached, to do violence to the language of the statute. It does not require action to be taken by the court within two years. To quote the language of the Court of Claims in the case of *Bellocque* v. *The United States* (13 C. Cls. R., 195):

> As there is no statutory declaration that action upon such a motion shall not be taken after the expiration of two years, the right to take such action survives the lapse of that period and it is competent for the court to hear and determine the motion whenever it shall thereafter be properly brought up.

The learned counsel for the appellant attacks the reasoning of the court on the ground that it assumes that the Court of Claims may, in the absence of an express statutory provision, grant a motion for new

trial properly filed, at any time. This assumption he combats. But, as we have just demonstrated, the assumption is perfectly sound; and with this light on the question, the reasoning of the Court of Claims in the *Bellocque* case, both in the paragraph quoted above and in the other portions of the opinion, is sound and unanswerable.

The appellant cites certain decisions as tending to sustain his contention. They are all based upon statutes, and to ascertain whether they are in point it is necessary to refer to the statutes. These are, with one exception, clearly distinguishable in effect from section 1088, Revised Statutes. The exception is in the case of *Vaughn* v. *O'Connor* (12 Nebr., 478). The statute upon which that case depended is quoted in the appellant's brief (p. 12) and is similar in language to section 1088, Revised Statutes; but the decision in *Vaughn* v. *O'Connor*, following *Cox* v. *Tyler* (6 Nebr., 297), hinged on the fact that justices of the peace and probate or county judges were both governed by the code relating to courts of justices of the peace and had no power whatever to grant a motion for new trial except that given to them by the statute in question. The Court of Claims, on the other hand, has an inherent power to grant motions for new trial, and its jurisdiction is not to be measured by the rules applicable to that of a justice of the peace.

Coopwood v. *Pruett* (30 Miss., 206) is not in point. That was a case where the judge took the case under

advisement and handed in a decision to the clerk's office two months after his term of office as a judge had expired.

James v. *Appel* (192 U. S., 129) was decided on the familiar principle that, the statute of Arizona having been copied from a Texas statute, which had long been judicially construed, the construction was adopted with the statute. That case and the other Arizona cases and the Texas cases depend upon a statute which expressly declares that motions for new trial must be made within two days after verdict or judgment and that "such motions must be disposed of at the term at which the motion is made." (Revised Statutes, Arizona, 1887, paragraphs 836, 837; 1 Sayles Texas Civil Statutes, 1372.) This is far stronger language than that which we are here called to construe; yet in the Arizona courts at least the reasonableness of the decision is further strengthened by a supplemental statute providing in effect that if the motion be not acted upon by the court it shall be taken as overruled, with exceptions reserved, and shall be determined by the Supreme Court on appeal. (Acts of 1891, No. 49, p. 69.)

The Alabama cases do not sustain the appellant's contention, but are directly opposed. In that jurisdiction it is held that "if during the term at which the judgment is rendered a motion for new trial is made and continued, the court may at a subsequent term hear and decide it." (*Ex parte Highland Ave. and Belt R. R. Co.*, 105 Ala., 221; *Hundley* v. *Yonge*, 69 Ala., 89; *Fitzpatrick* v. *Hill*, 9 Ala., 783.)

In Arkansas also the statute expressly required that all motions for new trial be determined at the term of court during which they were made (Revised Statutes, Arkansas, 1838, p. 637, §130); yet it is held that under that statute the court may consider a motion after the term has expired, provided it is specially continued during the term. (*Walker* v. *Jefferson*, 5 Ark., 23.)

In Indiana it was first held that such a statute was directory merely (*Fergus* v. *Hawthorn*, 30 Ind., 444), on the ground that when the moving party was not at fault the delay of the court could not deprive him of his right. Subsequent cases were in conflict with this and it was expressly overruled in *Crews* v. *Ross* (44 Ind., 481). At the next revision of the statutes the paragraph was amended so that the former rule now prevails. (*Rodman* v. *Reynolds*, 114 Ind., 148.)

In other jurisdictions statutes equally direct in language and far stronger in favor of the appellant's contention than section 1088, Revised Statutes, have been held to be directory merely and not mandatory. The effect given them is that contended for here—to limit the time of filing the motion and to avoid the loss of rights to a diligent party by the mere failure of the court to act. The Colorado code contains this provision:

> Provided always that the motion for new trial and decision thereon shall be made and had at the same term the findings were made or the verdict rendered.

In construing this provision and holding it to be directory merely, so far as the action of the court is required to be performed within a specified time, the court said:

> It is the duty of courts to use all reasonable diligence in the decision of motions and other matters presented for their determination, but to say that they shall all be decided at the same term during which they were presented, regardless of their importance or difficulty or of the time of submission, would be unreasonable. * * * It not infrequently happens that these motions are presented and argued or submitted upon briefs on the last day of the term. In many instances they require a thorough review of the evidence, and they often involve the examination of authorities not previously brought to the attention of the court. If the provision is held to be mandatory, the effect will be to require many of these motions to be decided without due consideration, a result which will defeat the spirit and intent of the statute. (*Gomer* v. *Chaffee*, 5 Colo., 383.)

A similar statute in California has been held to be directory and not mandatory (*McQuellan* v. *Donohue*, 49 Calif., 157). See also *Vermute* v. *Shaw*, 4 Calif., 214, and *Broad* v. *Murray*, 44 Calif., 228.

The injustice of allowing the inaction of the court to prejudice the rights of parties is set forth by the Supreme Court of Georgia in the case of *Johnston*

v. *Simmons* (77 Ga., 298), where a motion for new trial was made during the term and a consent order was taken providing that the judge before whom the case was tried should take the motion with him and pass upon it "within the next thirty days in vacation," and the judge failed to decide the motion within that time. The court held that this did not operate to prevent its decision at a subsequent term, saying:

> It seems to us that the only legal consequence of the failure by the judge to exercise the authority conferred upon him by such order would be to leave the motion still pending. We can not understand how mere inaction on his part could result to the detriment of the plaintiffs in error.

A distinction might reasonably be made between such a motion as that in the case at bar, which is based upon a printed record of evidence, and a motion made on the minutes, where the evidence is preserved only in the recollection of the trial judge. The statutes make this distinction in some States and require such a motion to be heard at the same term; yet even such motions may be heard after the term, if made in proper time. In Wisconsin such a motion made within the term was heard by the court ten years afterwards and the decision sustained by the Supreme Court. (*Hinton* v. *Coleman*, 76 Wis., 221.) Such a motion can be kept alive after the term by the stipulation of the parties. (*Steinhofel* v. *R. R. Co.*, 92 Wis., 123.)

In Minnesota the statute provides that "such motions in cases hereafter tried, if heard upon the minutes, can only be heard at the same term of court at which the trial is heard." (General Statutes 1878, chap. 66, § 254; General Statutes 1894, § 5399.) It was held, however, that a motion made in time may be argued, submitted, and decided at a subsequent term and that the defendant waived the objection by appearing and arguing the motion on the merits, or even by waiting until after the plaintiff had called up the motion and argued it before making his objection. (*Gribble* v. *Livermore*, 64 Minn., 396; *Larsen* v *Ross*, 56 Minn., 74.)

A review of these decisions shows the tendency of the courts to go to almost any length rather than permit the inaction of the court to prejudice the rights of a diligent party. In this case, however, it is not necessary to go so far, or in any degree to strain the language of the statute. The two statutes under which the motion was made clearly contemplated the extension of the time for filing the motion, as that is the only effect which can be given to them. It is equally clear that they extend that time to a full two years from the date of the judgment. The act of August, 1894, required the motions to be filed, although the court was not in session and did not convene until after the two years' limitation had expired. When the motions had been made in accordance with the statute the court acquired jurisdiction over them, and the statute itself had expressly suspended the pay-

ment of the judgments until the court acted upon the the motions (28 Stat., 476). There is nothing in either statute which limits the time within which the court must act in the exercise of the jurisdiction thus acquired.

SECOND ASSIGNMENT OF ERROR.

Under the second assignment of error the appellant contends that the motion made by the United States was not sufficient because evidence was not offered in its support. It does not appear upon what part of the record this assignment is based. The record does not show what evidence was offered in support of the motion. Such evidence would not be properly a part of the record on appeal. If the motion was made in time, it was addressed solely to the discretion of the Court of Claims, and the action of that court upon the motion is conclusive and not subject to review. (*Young* v. *The United States*, 95 U. S., 641.) The authorities cited by the appellant do not sustain his contention that the evidence as well as the motion must be filed within the two years' period.

But the evidence was, as a matter of fact, before the court as soon as the motion was filed. The motion was based upon the fact that the United States and the Cheyenne tribe of Indians were at war at the time specified in the petition. This is a matter of which the court is bound to take judicial notice. The evidence was contained in the history of the times and was documentary in character.

Such evidence was, of course, never filed in the court, but was simply referred to in argument, the documents being equally accessible to the court and to the opposing counsel.

THIRD ASSIGNMENT OF ERROR.

The appellant contends further that because the original judgment was rendered upon a so-called "stipulation of facts in allowed claims" the court had no power to grant a motion for new trial. This statement he qualifies by the admission that such a power would exist if a question of fraud were concerned. This admission defeats his argument.

This is an allegation of error in a matter which is not subject to review. "A case having been made upon the record such as would justify its interference, that court [the Court of Claims] had the right to hear the evidence and decide. Over its decision within that jurisdiction we have no control, for the statute has not provided an appeal." (*Young* v. *The United States*, 95 U. S., 641, 643.)

The assignment is not sustained by the record. The motion was based upon an allegation of fraud, wrong, or injustice, following the words of the statute. The motion was allowed by the Court of Claims without any statement of its reasons. The evidence is not before this court. For aught that the record contains or that counsel knows, the court may have held that the so-called "stipulation of facts" was a fraud upon the United States.

This alone is a sufficient answer to the appellant's argument.

But, assuming, for the sake of the argument, that no question of fraud existed, did the court, after having rendered judgment as provided by law in a claim based upon section 4 of the Indian depredation act, have the power to set aside that judgment under the provisions of section 1088, Revised Statutes? To answer this in the negative would be to hold that the court had no power whatever over the judgment after it had once been rendered.

The Court of Claims has answered that question in the case of *McCollum* v. *The United States* (33 C. Cls. R., 469, 472):

> The conditions which the Congress annex to the right to sue the United States can not be waived, and so judgments rendered by agreement of parties, as in the case at bar, have no more sanctity in respect of motions for new trial than judgments rendered in litigated cases.

A legislative construction of the statute as applicable to this and similar cases is found in the act of August 23, 1894, hereinbefore referred to. That act contemplated and directed the filing of motions for new trial in a considerable number of cases wherein judgments had been rendered upon the allowance of the Secretary of the Interior and under the form of a stipulation similar in all respects to the one contained in the record in this case.

The "Stipulation of Facts."

The "stipulation of facts in allowed claims" upon which the judgment was rendered was unauthorized by the statute, and therefore null and void. It proceeded on the assumption that the claim was one which was properly included in the third proviso of the fourth section of the jurisdictional act. It is there provided:

> That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and subsequent Indian appropriation acts, shall have priority of consideration by such courts.
>
> And judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses and the documentary evidence, including reports of Department agents therein, may be read as depositions and proofs.

The "subsequent acts" referred to in the statute were merely provisions in the successive appropriation bills for continuing the investigation and have

no bearing upon the point at issue. The act of March 3, 1885 (23 Stat., 376), authorized the Secretary of the Interior to examine and allow claims "on account of depredations committed *chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States.*" Thus the jurisdiction of the Secretary was limited to cases in which the Indian tribe had by treaty stipulation made itself liable for the depredations committed by individuals of the tribe. The court has held that the allowance by him of a claim against a tribe not bound by an express treaty stipulation was absolutely void; and that in such a case the claimant could not have his election to proceed under the allowance by the Secretary, but must come into court and try his case as if no attempt had ever been made by the Secretary of the Interior to act upon it. (*Mares* v. *The United States*, 29 C. Cls. R., 197; *Labadi* v. *The United States*, 31 C. Cls. R., 205.)

The claim in this case was against the Cheyenne tribe of Indians and the depredations were committed in the year 1867. A treaty was concluded between the United States and the Cheyenne tribe of Indians on October 14, 1865 (14 Stat., 703). The ninth article of that treaty provided that "upon the ratification of this treaty, all former treaties are hereby abrogated." The treaty was ratified on May 22, 1866. No subsequent treaty was made before the commission of the depredations complained of. The treaty of 1865 was, then, the only existing treaty

by which to measure the obligations of the Cheyenne Indians at the time of the depredations in 1867; and that treaty contained no provision for the payment of Indian depredation claims.

Even if the treaty of 1865 had not abrogated all former treaties, there was no existing treaty with the Cheyenne tribe which authorized the Secretary of the Interior to charge them with the payment of damages for a depredation committed by individuals of the tribe. The treaty of 1825 did not contain any such authority. (*Labadi* v. *The United States and the Cheyenne Indians*, 31 C. Cls. R., 205.)

In the case last cited it was also held that for a depredation committed by Cheyenne Indians in 1854 the Secretary had no authority to allow a claim; but the Court of Claims afterwards held that such authority could be found in the so-called Fort Laramie treaty of 1851. (*Moore* v. *The United States and Cheyenne Indians*, 32 C. Cls. R., 593.) That case has not yet been finally decided, and consequently the question has not come before this court; but the appellees submit with confidence that the Secretary derived no authority from the agreement in question, because it was never finally ratified. Its history is given in the opinion of the Court of Claims last cited. It there appears that the treaty was negotiated with a provision for the payment of annuities to the various tribes concerned for a period of fifty years. The Senate ratified the treaty, with an amendment reducing that period to ten years, thus cutting off

four-fifths of the consideration to be received by the tribes for the concessions made by them. Some of the tribes consented to this amendment, while others did not. The treaty was therefore never finally ratified, was never proclaimed by the President, and does not appear in the Revised Statutes, where all treaties are published.

A treaty in law is "a league or contract between two or more nations or sovereigns, in modern usage formally signed by commissioners properly authorized and solemnly ratified by the several sovereigns or the supreme power of each state" (Century Dictionary).

By the Constitution of the United States the treaty-making power is vested in the President, by and with the advice and consent of the Senate. It follows, of course, that no "treaty" can be made except by the concurrent action of the President and the Senate; and that any agreement, no matter what its subject and no matter how it be regarded by Congress, or how much soever it be acted upon by any Department or by any single branch of the Government, is not a treaty until it has been approved and ratified by the authority and in the form provided by law and by the Constitution. The "Fort Laramie treaty" of 1851 was never ratified and never proclaimed by the President, and the agreement was therefore not a treaty; moreover, the article of the agreement which refers to depredations (Article IV) is expressly made contingent on the ratification of the treaty, which never took place. Both for the general reason,

that the treaty is not operative and can not be enforced, and for the particular reason, that the condition upon which the agreement to make indemnity rested has not been fulfilled, such agreement is not and never has been binding upon the Cheyenne tribe.

Viewed in the light of an ordinary contract, the agreement would be equally inoperative. There was never a meeting of the minds of the two contracting parties. The consideration expressed in the original draft was reduced by 80 per cent in the amended draft which was submitted to the Indians for their consent, which they never gave. Such a contract would not be held binding between ordinary parties; and the parties to this agreement were, on one side, various tribes of Indians, and it has been the policy of this court from the beginning to interpret such agreements most favorably to the Indian tribes.

For these reasons the Secretary of the Interior had no authority to allow the claim under the so-called treaty of Fort Laramie, even if it had not been superseded before the time of the depredations charged in this case.

Even if the treaty of Fort Laramie was ever operative, it was abrogated by the treaty of 1865 (*supra*). That treaty was made with the "Confederated Tribes of Arapahoe and Cheyenne Indians of the Upper Arkansas River." That some of the members of the tribes were not represented at the conference is shown by the eighth article, in which the

Indians "expressly covenant and agree that they will use their utmost endeavor to induce that portion of the respective tribes not now present to unite with them and accede to the provisions of this treaty, which union and accession shall be evidenced and made binding on all parties whenever such absentees shall have participated in the beneficial provisions of this treaty."

It was argued in the court below that this language and the language of the caption showed that only a part of the tribe joined in the treaty and that a part of the tribe can not abrogate a prior treaty made by the whole tribe. But the language of the treaty will not bear this interpretation. There was but one tribe of Cheyenne Indians known as such, and no division of that tribe has ever been recognized by the United States. A small band of the Northern Cheyennes were associated with the Northern Sioux, but they do not figure in this treaty. The caption of the treaty in the statutes, the caption in the "Revision of Indian Treaties," and the preamble to the treaty all describe the contracting parties as "the Cheyenne and Arapahoe tribes of Indians" without qualification (14 Stat., 703; Revision of Indian Treaties, 122). The language of the treaty itself, in which the portion of the tribe not present at the council are described as "absentees" and in which their adhesion to the treaty is to be signified merely by their acceptance of its benefits, shows that they were referred to only as individuals and not as a

body capable of making or marring a treaty. The appellant can not question the validity of the treaty after its ratification both by the tribe and the United States, and its proclamation by the President. (*Fellows* v. *Blacksmith*, 19 How., 366, 372.)

Again, if the previous treaties had not been expressly abrogated by the treaty of 1865 they were abrogated by the war between the United States and the Cheyenne Indians in 1864–65. (*Litchfield* v. *The United States*, 32 C. Cls. R., 585.) It can not be contended that the old treaty was revived after the termination of hostilities, because a new treaty was then immediately negotiated, which expressly abrogated all former treaties. If, however, it could be claimed that such treaties were revived notwithstanding that abrogation, they were undoubtedly again abrogated, and ceased to have any effect when in the spring of 1867 the same tribe and the United States were again at war, as held by the Court of Claims in the case at bar. It would be absurd to hold that an agreement on the part of the tribe to pay for the destruction of property by individuals was effective during a state of hostility between the tribe and the United States, when such individuals might constitute a war party authorized by the tribe to perform the destruction complained of as a very incident to that state of hostility.

Since there was no treaty obligation to pay for depredations, it follows that the Secretary of the Interior had no jurisdiction or authority to allow

the claim; that the attempted allowance by him was absolutely void; that the case was not one which could be passed upon by the Attorney-General and submitted to the court for a *pro forma* judgment on the election of the parties not to reopen; that the stipulation based on the contrary assumption was wholly void, because it was unauthorized by the statute; and that the court was not bound in any way by such unauthorized stipulation.

The court without jurisdiction.

Not only was the stipulation void for the reason given above, but it attempted to confer upon the court a jurisdiction which it did not possess. It is elementary that jurisdiction can not be conferred by the consent of the parties.

The Cheyenne Indians were not in amity at the date of the depredation. The Court of Claims was therefore without jurisdiction under the first section of the statute, which requires amity as a condition to jurisdiction. But the appellant maintains that the court had jurisdiction of the case under the second paragraph of the first section of the act of March 3, 1891. The paragraph referred to reads as follows:

> Such jurisdiction shall also extend to all cases which have been allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipula-

> tions with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations herein provided.

The punctuation in the above extract is that in the Statutes at Large. The citation of the same statute given on page 20 of the appellant's brief, which ends with a period after the word "Department," is incomplete and misleading.

The statutes referred to in the above extract are the same as those enumerated in the fourth section considered above. The provisions of this paragraph embrace the claims referred to in that section (section 4) and also all claims authorized to be examined, and not actually examined, under the same statutes. It is clear that the words, "under the act of Congress making appropriations," etc., modify both classes of cases embraced in the preceding words of the section. What claims, then, were authorized to be examined? Only the claims against the tribes which had bound themselves by treaty to pay for depredations committed by their members. (*Mares* v. *The United States, supra.*) This was not such a claim. We have just seen that the Secretary's allowance was void for want of jurisdiction; and this claim was therefore neither an allowed claim nor one "authorized to be examined" under the same statutes.

It follows that, since this claim falls in neither of the two classes, the Court of Claims did not take juris-

diction under the second paragraph and was wholly without jurisdiction to award judgment for the claimant.

The position taken here, as to the jurisdiction of the Court of Claims, is opposed to the dictum in the *Leighton* case, relied upon by the appellant. The point was not material in that case and was not directly decided there. It is clear from the opinion that in the argument of that case it was assumed that the Secretary of the Interior had made a valid allowance of the claim; and, assuming that to be the case, the court said:

> It follows, therefore, that though under the terms of the second jurisdictional clause the Court of Claims had jurisdiction over this claim, yet the case having been reopened by the claimant, the Court of Claims properly proceeded to inquire into its merits and correctly found that there was no law or treaty upon which to base a liability of the United States or the Indians. (*Leighton* v. *The United States*, 161 U. S., 291, 297.)

A more correct understanding of the effect of this decision can perhaps be obtained from the syllabus than from a consideration of one sentence disassociated from the remainder of the opinion. The syllabus says that under the first clause of the statute the Court of Claims was without jurisdiction to render a judgment against the United States and that "the same result is reached practically if the claim is regarded as within the jurisdiction of that court

under the second jurisdictional clause." The statement in the paragraph quoted above was provisional and it was not necessary to the decision of the case, since the judgment of the Court of Claims was affirmed in any event.

The stipulation in this case contained the statements of fact (1) that the claim had been allowed under the provisions of the act of March 3, 1885, and (2) that the defendant Indians were in amity with the United States. One or the other of these facts was necessary to give the court jurisdiction; but both were erroneous, and such an erroneous stipulation of fact could not operate to confer jurisdiction upon the court. That the Court of Claims may, under section 1088, Revised Statutes, allow a motion for new trial in any case where, because of an error in fact it had assumed a jurisdiction which it did not possess, ought not to be controverted.

FOURTH ASSIGNMENT OF ERROR.

Under the fourth assignment of error, the counsel for the appellant assumes that the motion for new trial was based upon error of law and not of fact; but the finding of the court shows that the defendant Indians were not in amity with the United States, and it has been repeatedly held that amity is a mixed question of fact and law. (*Marks* v. *The United States*, 28 C. Cls. R., 147; 161 U. S., 297.) In every case where the question of amity has been before this court, it has been upon a finding of fact on the part of

the Court of Claims that the Indian tribe was not in amity with the United States.

Counsel's assumptions in regard to the prior construction of the statute are not justified by anything in the record or in the reports.

FIFTH ASSIGNMENT OF ERROR.

Under the fifth assignment of error the appellant contends that the United States is not entitled to take advantage of the statute and move for a new trial, because the judgment is primarily against the Cheyenne Indian tribe, and because, as he contends, the Cheyenne tribe has annuities sufficient to satisfy the judgment. His contention is in effect that a wrongful judgment against the United States should be allowed to stand because the United States can not be compelled to pay it.

A sufficient answer to this is found in the opinion of this court in the case of *Leighton* v. *The United States* (161 U. S., 291), where it is said:

> Nor is this a matter in which the Government is uninterested. In case of an award by the Court of Claims the United States becomes in fact, if not in form, the primary and a solvent judgment debtor. The recourse provided over against the Indian tribe, while it may be certain as to amount, is uncertain as to collection, and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate.

That the United States is in this case "in fact, if not in form, the primary and solvent judgment debtor" is shown by the fact that an appropriation was made by Congress to pay the judgment, the claimant being identified by name (28 Stat., 476; Senate Ex. Doc., No. 82, Fifty-third Congress, second session). That appropriation is still available; and if the judgment were revived the Secretary of the Treasury would be required, under the terms of the appropriation act, to pay the judgment from the Treasury, provided the Secretary of the Interior in his discretion, "having due regard to the educational and other necessary requirements" of the Cheyenne tribe, should certify that no deduction should be made from their funds. This certification would undoubtedly be made by the Secretary of the Interior. No such judgment has ever been paid out of the Cheyenne funds, and it is not probable that one ever will be.

So long as a wrongful judgment exists against the United States, it can not be said that the statute does not apply. The court will not inquire into the solvency of joint judgment debtors, and permit a judgment to stand against one party because the other party can be compelled to pay the whole amount of the judgment.

SIXTH ASSIGNMENT OF ERROR.

The appellant contends that—

> The court erred in dissmissing claimant's petition on April 23, 1906, because the judg-

ment of October 11, 1892, in so far as the same was against the defendant Cheyenne Indians, was then a valid and subsisting judgment and in full force and effect, no proceedings to vacate the same having been instituted.

This assignment of error raises two questions: First, whether the provisions of section 1088, Revised Statutes, are available for the protection of the defendant Indians in such a case as this; and, secondly, whether, assuming that the motion for new trial was made on behalf of the United States alone, it was error in the Court of Claims to set aside the judgment against both the United States and the Indian tribe.

At the time section 1088 was enacted, the jurisdiction of the Court of Claims was confined to suits in which the United States was the sole defendant. When the jurisdiction of the court is enlarged from time to time the statute, which is general in its terms, becomes applicable to the new class of cases. It was so in the District of Columbia cases, although the statute there expressly provided that all motions for new trial must be filed within twenty days (21 Stat., 285). The Court of Claims denied a motion for new trial under section 1088 for want of jurisdiction; but when the case came to this court, the motion was considered on its merits and the court held that it was not a proper motion under that statute, because founded on error of law and not on error of fact. (*In re District of Columbia*, 180 U. S., 250.)

In the Indian depredation act there is no language excepting the cases arising under it from the provisions of section 1088, which is therefore applicable as in other cases. (*McCollum* v. *The United States*, 33 C. Cls. R., 469.)

The language of the statute does not limit its application to claims against the United States alone. It reads, "The Court of Claims at any time while *any claim* is pending before it, * * * may on motion on behalf of the United States grant a new trial and *stay the payment of any judgment therein*." We contend that although the motion be made on behalf of the United States, the language of the statute not only permits but requires the court to grant a new trial of the claim—not a new trial as to the liability of the United States alone, but a new trial of the whole case. The provision for staying the judgment is sufficient to indicate this construction of the statute. There is but one judgment rendered in such a case. It is a thing entire and indivisible. If it be set aside as to the United States, it can not stand against the Indian tribe. Under the jurisdictional act, no case can arise where the tribe is liable and the United States is not. The court can not render a judgment against an Indian tribe without at the same time rendering it against the United States. Has it then the power to do indirectly that which it can not do directly?

The statute requires the Attorney-General to appear for the Indians as well as for the United

States; and where the tribe has not availed itself of the privilege of employing counsel, he is their sole legal representative. His act is their act. The United States and the tribe stand in the relation of guardian and ward. It is a reasonable construction of the Statutes to hold that when Congress required the tribe to submit itself to the court as a joint defendant with the United States and committed its interests to the legal representative of the United States, it was intended that the ward should have the benefit of the same guaranties against wrongful judgments that are enjoyed by the guardian. It has long been the doctrine of this court that the Indians are entitled by reason of their relations with the Government to the tender care of the courts; and that all legislation respecting them shall be interpreted as intended for their benefit. (*Marks* v. *The United States*, 161 U. S., 297.)

The appellant contends further that the Court of Claims had the power to allow a motion for new trial on behalf of one of several defendants without disturbing the verdict as to the other defendants, and he cites several cases in support of that contention, admitting, however, that there is a conflict of authority on the question. He relies upon the case of *Albright* v. *McTighe* (49 Fed. R., 817) as showing that the weight of authority is in favor of the power of the court to sever the judgment. It is somewhat remarkable that in that very case, while the court argued in favor of its power to allow a motion as to

one defendant and overrule it as to the others, it did not take that action. The court said:

> However technically we may have the power (and I do not doubt it) to enforce against two a verdict which was given against three, it seems to me it would be yielding too much to a sense of justice of an outraged plaintiff and in some sense would be assuming the power and authority of the jury in fixing the damages, for the court to discharge one of three and hold only the other two, when the jury had not had their attention called to the matter in any way.

In the *Indiana* case, which was upon contract, the question was merely one between several defendants, there being no ground for new trial as against the plaintiff.

In *Bremen Bank* v. *Umrath*, 55 Mo. App., 43, the court held that it was error to set aside the verdict as to all the defendants *where their liability is several and not dependent upon the same conditions.*

In *Union Bank* v. *McClung*, 9 Humph., 98, also cited by the appellant, the court held that no new trial could be granted as to one without granting it as to all, in actions against joint defendants upon contract at common law; but held that the rule was modified by statute in that state.

The remaining cases cited by the appellant are either not in point or they are actions against joint tort feasors, where the liability is joint and several.

On the other hand, the rule at common law was clear that if a motion for new trial was granted as to one joint defendant there must be a new trial as to all.

2 Tidd's Practice, 9th Ed., 911.
3 Salk., 362.
Bond v. *Sparks*, 12 Mod., 275.
Parker v. *Godin*, 2 Stra., 813.
Doe v. *Martin*, 13 M. & W., 810.

And this rule has been followed in many cases in this country. It has been held that "the effect of an order granting a new trial on motion of one of the joint and several defendants was to vacate the former judgment, and operated as a new trial to all the defendants."

Gulf, etc., Rwy. Co. v *James*, 15 Am. Dec., 743, and cases cited.
Long v. *Garnett*, 45 Tex., 401.
Wooten v. *Kauffman*, 67 Tex., 488.
Riggs v. *Hatch*, 16 Fed., 839.
Ouly v. *Dickinson*, 5 Coldw., 486.
McGillis v. *Bishop*, 27 Ill. App., 53.

This court has held that where some defendants have not the right of appeal, while others have, the judgment of the lower court should be reversed as to all, the case being one in which the various parties stood in the relation of vendors, warrantors, and vendees. (*Findlaye* v. *Hinde*, 1 Pet., 241.)

In another case, where the judgment was erroneous as to the guarantor, the court held that it could not stand as against the principal, although the verdict was justified as to him. (*Draper* v. *State*, 1 Head, 262.)

In passing upon the same question, the Supreme Court of Tennessee said:

> A party has the right to appeal from a void judgment; and this judgment, being void as to such party, it is void as to the other joint defendants, for the judgment is entire and cannot be good in part and bad in part. (*Trousdale* v. *Donnell*, 4 Humph., 273.)

The conclusion to be drawn from these authorities is that it is not error to allow a motion as to all joint defendants where the application is made by only one; that the question is one which addresses itself to the discretion of the court in the circumstances of the case. The appellant's contention from the cases cited by him is only that the court *may* allow a new trial as to one party while permitting the judgment to stand as to the others.

The motion for new trial was granted by the Court of Claims on the whole case. The new trial was a new trial as to all parties and the judgment, by which the claimant's petition was dismissed, was a judgment in favor of the Cheyenne Indians as well as the United States. In so acting, the court exercised its undoubted discretion in the disposal of the motion for new trial, and its action in that respect is not reviewable.

If the action of the court could be reviewed here, it would be found to be eminently correct. The motion for new trial on behalf of the United States as guarantor was based upon grounds which went directly to the liability of the principal. No other

grounds would have availed the United States, since, as we have seen, the statute makes the United States liable in every case where the defendant Indians are liable. To grant the motion as to one party on grounds which affect the liability of both, and to leave the judgment standing, although equally wrongful, as to the other party, would have been to abuse the discretion of the court (if it possesses such discretion) and would be going farther from the old rule than any of the cases cited by the appellant.

More than this. If our contention is correct, the judgment rendered against the Indians and the United States was equally without jurisdiction as to both. It was a void judgment and its validity could be attacked collaterally in any other court. To hold with the appellant on this point would be to say that the Court of Claims, although retaining control of the judgment by reason of the pendency of the motion for new trial, could not set aside the judgment after the want of jurisdiction had been shown. The motion for new trial having been granted as to the whole case, and the petition now having been dismissed, the effect of the appellant's contention is to ask this court to revive a judgment which was void *ab initio*.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 208.

JARIB L. SANDERSON, SURVIVING PARTNER OF THE FIRM OF BARLOW, SANDERSON & CO., APPELLANT,

vs.

THE UNITED STATES AND THE CHEYENNE TRIBE OR NATION OF INDIANS, APPELLEES.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

Counsel for appellees have devoted considerable time to a demonstration of the right of the Court of Claims to allow, at a subsequent term, a motion for new trial (under its ordinary jurisdiction) filed during the term at which judgment was rendered.

The Court of Claims files findings of fact analogous to the verdict of a jury, and has adopted the practice of rendering judgment thereon forthwith. This is the usual, although not the universal, practice of that court.

The general subject of new trials is not provided for by statute, but the court has always assumed, and with unquestionable propriety, the common-law powers of a court of record to review its acts upon proper motion. It has always, however, maintained the necessity for action to be taken

during the term at which judgment is rendered, to prese
its control over the cause, which otherwise would pass beyo
its further jurisdiction.

Sampson *v.* U. S., 36 C. Cls., 194 (195).
Campbell *v.* U. S., 19 C. Cls., 426.
Wade *v.* U. S., 21 C. Cls., 142.
In re McKay, 30 C. Cls., 1.
Murdock *v.* District of Columbia, 23 C. Cls., 43.
Russell *v.* U. S., 15 C. Cls., 168 (173).
Seat *v.* U. S., 18 C. Cls., 458 (468).

In holding that by the entertaining of a motion for n
trial made during the term it might extend its jurisdicti
of the cause beyond the term, it but follows the ordinary r
maintained by the courts in the absence of statutory prohi
tion.

Bronson *v.* Schulten, 104 U. S., 410.

It is the practice of the Court of Claims, on the last day
each term, to enter a general order of continuance of
pending motions, and this is held sufficient to carry jurisd
tion to determine such matters over to the next ensui
term.

In Campbell *v.* U. S., *supra*, the court discussed this qu
tion generally, and after quoting from Bronson *v.* Schult
supra, said:

> "From this we infer that if in the Supreme Co
> a motion be made *during the term at which a ju*
> *ment is rendered*, to set aside, modify, or correct t
> judgment, and that motion be continued to a s
> ceeding term, the court may, at the succeeding ter
> sustain it for sufficient cause."

In the present case this rule cannot be claimed to app
because the expiration of the two-year period was not coin
dent with the expiration of a term of the court.

But there is no analogy between ordinary motions

new trial and those filed under Revised Statutes, section 1088. The first class exists by virtue of the inherent power of courts over their orders and proceedings during the term and while *in fieri;* the second is a special statutory right to review, under certain named conditions, their judgments, which have already, in every other particular, passed beyond their jurisdiction.

Discussion of the question of the limitation of the court's action in respect to time, in so far as authority or precedent is concerned, relates to cases arising under statutes affecting these two classes of motions—the first where by statute the right otherwise existing is directed to be exercised within a certain time; the second where the statute creates a right not recognized by the principles of the common law. Special proceedings similar to those authorized by section 1088 are provided for in the statutes of many of the States. The distinction between the two classes of motions is more apparent in ordinary courts, where, as under the common law, in the first class (motions after verdict and before judgment) there is no final judgment or disposition of the cause until after the motion has been decided.

An important difference governing the construction of these two classes of statutes, the one directing the court to dispose of the ordinary motion for new trial within a fixed time and the other authorizing the court to vacate upon certain grounds and within a certain time a judgment which, tested by the ordinary rules, has become final, arises from the fact that, in respect to the former, the statute has, in derogation of the common-law right of the moving party, reduced and restricted his right otherwise existing, and in the latter it has, in derogation of the common-law right of the other party, created a right with certain conditions and limitations. In the first time is regulated with respect to a matter of procedure; in the second time is prescribed as a period of limitation.

It is only in a few of the States that statutes have required

the court to dispose of a motion for new trial before judgment within a fixed time.

In the Colorado case, cited on pages 16 and 17 of the Brief for Appellees, the court was probably influenced by the language of the particular statute and by the fact that they still retained jurisdiction over the cause, no final judgment having been entered on the verdict, as they say:

> "We are of the opinion that the proceedings at the April term, subsequent to the findings, operated to reserve the case for further consideration, and to continue the jurisdiction beyond that term. No judgment was entered at the April term, and no direction by the court to enter judgment was given at that term."

In this case the Colorado court cited no authority other than certain California decisions upon a statute wholly different. The California statute provided—

> "Upon the trial of a question of fact by the court its decision must be given in writing and filed with the clerk within twenty days after the cause is submitted for decision, and unless the decision is filed within that time the action must be tried again."

The case cited and relied on by the Colorado court, McQuillan *v.* Donahue, 49 Calif., 157, held that the provision for a written decision was directory merely, the decision having been rendered orally within the twenty days and no written decision having ever been filed by the judge. This was probably because the statute provided for the granting of a new trial as a penalty for failing to decide within the time limit only, and was silent as to the effect of a failure to deliver a written decision.

Statutes Fixing Time for Decision on Motion for New Trial Before Judgment are Mandatory.

Although a statute fixing a limit to the time for the court to act on a motion for new trial restricts the common-law right of the moving party, and therefore entitles him to a liberal construction of the statute in his favor, it is held by the great weight of authority that even in this class of cases the court has no jurisdiction over the motion beyond the time fixed for decision.

Recent cases involving this question are Clements *v.* Buckner (Tex., 1904), 80 S. W., 235, cited on our original brief, and Turner *v.* Davis (1903), 132 N. Car., 187.

Clements *v.* Buckner, *supra*, holds that the provisions of Texas Revised Statutes (1895), article 1374, that motions for new trial shall be determined at the term at which such motions are made, is mandatory, and that the act of the judge continuing such a motion to a subsequent term is without jurisdiction and void.

Turner *v.* Davis, *supra*, holds that section 412, paragraph 4, of the North Carolina Code of Civil Procedure (1883) deprives the court of jurisdiction to hear the motion for new trial beyond the trial term, although the court had passed an order continuing the motion to the succeeding term.

Other cases involving the same question are cited on pages 14 and 15 of appellant's original brief.

Conditions Expressed in Statutes Authorizing Allowance of New Trial After Judgment Are Limitations on Power of the Court.

In the original brief of the appellant we cited certain cases wherein the question arose on statutes affording relief to the unsuccessful litigant by a motion for new trial after

the judgment had, except for this special statutory remedy, become final. These cases were—

Vaughn *v.* O'Connor, 12 Nebr., 478.
Fergus *v.* Wesler, 35 Ind., 53.
Hays *v.* May, 35 Ind., 427.
Crews *v.* Ross, 44 Ind., 481.

In Fergus *v.* Wesler, *supra*, the statute (Statutes of Indiana, 1870, containing Revised Statutes of 1852, with subsequent amendments, vol. 2, page 283), provided that—

> "SEC. 601. The court rendering the judgment, at any time within one year thereafter, upon the application of the party against whom judgment is rendered, his heirs or assigns or representatives, and upon payment of all costs, and of the damages, if the court so direct, shall vacate the judgment and grant a new trial."

In holding that the period of one year was a limitation upon the jurisdiction of the court to grant relief under this section, the court said:

> "Within a year of the rendition of the judgment, the appellant paid the costs and filed in the clerk's Office a motion for a new trial, as of course, under Sec. 601 of the Code. * * * There matters rested until more than a year after the rendition of the judgment, when the appellant moved the court in term time, on the written application filed in vacation, to vacate the judgment and grant him a new trial, as of right. The appellee objected to the new trial for the reason that more than one year had elapsed since the final judgment was rendered; and the court sustained the objection, and overruled the motion for new trial. This ruling was assigned for error. There was no error in this. The party who seeks a new trial under Sec. 601 of the Code must pay the costs, make application to the *court*, get the order granting a new trial, or its refusal to do so, within one year after the judgment is rendered, or he will be too late in such a proceeding as this."

This was the unquestioned interpretation of this statute until, in the revision of 1881 (Rev. Stat. of 1881, sec. 1064), the legislature of Indiana changed the statute to read as follows:

> "The court rendering the judgment, on application made within one year thereafter by the party against whom judgment is rendered, * * * shall vacate the judgment and grant a new trial."

This statute related, moreover, to the granting of a new trial of right, where the court had no discretion. The delay of the court to act in such a case as Crews *v.* Ross, *supra*, was undoubtedly a great hardship upon the moving party, and occasioned the change in the law.

Cases Not Cited on Original Brief.

The Illinois Revised Statutes of 1845, chapter 36, section 30, contain a provision relating to the granting of new trials as of right, similar to the Indiana statute. This statute was supplanted by a somewhat different provision of the Revised Statutes of 1874, chapter 45, section 35.

Under the statute of 1845, Chief Justice Treat, in the case of Emmons *v.* Bishop, 14 Ill., 152 (1852), held that the filing of the motion within the year was not sufficient. He said:

> "He must ask for and obtain a new trial within the year. If he does not, he waives the benefit of the statute. He may take a new trial at the term at which the judgment is entered; and if he omits to do so, he runs the risk of not having another opportunity to do so during the year."

Statutory provisions very similar to U. S. Revised Statutes, section 1088, exist in a number of the States. Section 5298 of the Revised Code of Civil Procedure of North Dakota provides that—

> "The court may * * * in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

In Sargent *v.* Kindred, decided by the Supreme Court of North Dakota in May, 1906 (9 N. Dak., 472), this statute was held to fix a limitation upon the action of the court. The opinion states:

> "We desire to place our decision on another ground. While the motion appears to have been made within a year after the defendant himself had actual knowledge of the entry of judgment, it was neither decided nor submitted to the court until after the expiration of more than a year from the time the defendant knew of such judgment. It is not enough that the motion is made within the year under section 4939, Comp. Laws. It must be made and submitted and the order granting the relief must also be made within the year. The language of the statute is explicit. It declares that the court shall have the power to relieve a party from a judgment at any time within one year after notice thereof. It is not enough to satisfy the language of the statute that the application for relief is made within the year, or that it is submitted within the year. But the court must take action within the year. It is true that a court to prevent prejudice to a suitor through its own delays, has power to direct that the order granting the relief be entered *nunc pro tunc* as of the time the motion was finally submitted.
>
> "In this way all possible injury to the litigants from the failure of the court to decide a motion of this character within the year may be prevented, provided the party has brought his motion to a hearing within the statutory time. * * *
>
> "In placing a construction on the statute in question we must keep in mind not only its language, which is very clear, but also the fact that it extends to the defeated party an extraordinary indulgence

> even in the theory that he must both move and submit his motion within the year. The statute vests in him a new right, and *he must take it burdened with the limitations found in the statute itself.*"

The right of the court to make a *nunc pro tunc* order is discussed *obiter,* and we would seriously question the legality of such an act. No such power has been recognized in Wisconsin and Oregon, where statutes exist identical in language (Rev. Stat. Wisconsin (1858), ch. 125, sec. 38; Hills' Code (Oregon), sec. 102).

In McKnight *v.* Livingston, 46 Wisc., 356 (1879), the Supreme Court of Wisconsin construed this statute to require the action of the court to be taken within the time stated or not at all. It said:

> "It is very clear that the court made no order, either orally or in writing, vacating and setting aside the judgment, until after the expiration of more than one year after the defendant making the motion had notice of such judgment. The record does not disclose that the delay in making the order was occasioned by the request of the plaintiffs; and we must presume, therefore, that it was the act of the judge of the court, without the request of either party." * * *

(After quoting the statute.)

> "The plain reading of the statute is, that the court may grant the relief indicated within one year after the party asking such relief has notice of the judgment, order or other proceeding against which he seeks relief. The law is one which grants powers not before exercised by the courts, and fixes a limit to the time within which such powers may be exercised.
>
> "The right to exercise this power at all is conceded to be conferred only by this statute. And it seems equally clear that such power must therefore be exercised within the time fixed by the statute for that purpose * * *

> "It is argued that the party cannot compel a decision of his application, in case the judge should delay in giving it. * * * But practically there is no difficulty in the matter. It is not to be presumed that any of the judges of the courts of this State would refuse to decide a question of this nature promptly, if they were desired to do so and were cognizant that any delay would prejudice the rights of the parties."

The Oregon statute was before the Supreme Court of that State on the same issue in Nicklin *v.* Robertson, 28 Ore., 278, decided in December, 1895. After discussing the question at some length the opinion concludes:

> "These authorities conclusively show that the statute limits the power to one year after notice of the 'judgment, order or proceedings,' and that the expiration of that time leaves the court without authority to set aside or modify its decision for any of the causes enumerated in the section quoted."

Under a similar statute, in Gerish *v.* Johnson, 5 Minn., 23, an appeal from an order overruling such a motion, the record showed that the motion was not heard until a year and two months after the judgment was entered, and the court said:

> "This alone was sufficient ground for the court below to deny the motion."

A similar construction is maintained by the California decisions (Moore *v.* Supreme Court, 86 Calif., 495).

An examination of the authorities shows that in every reported case which we have been able to discover, where statutory provisions authorize a court upon application of a party against whom a final judgment has been rendered to vacate the same within a fixed period of time, it has been held that the time fixed is the limit of jurisdiction.

This principle may well be regarded as founded on the

well-settled rule that the judgment of a court, rendered at any other time or place than that directed by law, is absolutely void.

"It is essential to the validity of a judgment that it be rendered at the time * * * prescribed by the law."

(Extract from opinion of Terry, Ch. J., in Wicks *v.* Ludwig, 9 Calif., 153.)

In Lawrence *v.* Cannavan, 76 Conn., 303, the question arose on the validity of a judgment rendered at the second term subsequent to the trial. The Statute invoked by the appellant was as follows:

> "Any judge of the superior court or of the court of common pleas, who shall have commenced the trial of any civil cause, shall have power to continue such trial and render judgment after the expiration of the term or session of the court at which such trial commenced; but such trial shall be ended and judgment rendered before the close of the next term or session."

The court, in reversing the judgment, said:

> "Under this section the Court of Common Pleas could, therefore, even against the objection of the parties, have heard the arguments in this case and decided it at any time before the close of the November term, which might by law have been continued until the first Monday of January, 1903. After that date the judgment could not have been properly rendered without the consent of the parties, either express or implied."

Section 3015 of the New York Civil Procedure (1893—Banks & Bro., Ed.) provides, with reference to the time for rendering decisions in certain cases—

> "In every other case, he must render judgment and enter it in his docket book, within four days after the cause has been finally submitted to him."

In Orvis *v.* Curtiss, 28 N. Y. Supp., 728, where the judgment was rendered after the time so fixed, the court says:

> "The justice had no jurisdiction to render the judgment he did in this case, because he rendered it after the time limited by law for his doing so."

The same principle has been declared in—

Kidd *v.* Burke, 142 Ala., 625.
Jackson *v.* State, 102 Ala., 76.
Brumley *v.* State, 20 Ark., 77.
Galusha *v.* Butterfield, 3 Ill., 227.
McCool *v.* State, 7 Ind., 378.
White *v.* Riggs, 27 Me., 114.
Holman *v.* Hogg, 83 Mo. App., 370.
American Fire Ins. Co. *v.* Paffe, 4 Okla., 110.

Many other cases might be cited to the same effect.

Decisions of the Court of Claims.

The only case in which this question appears to have been directly raised is Belloque *v.* U. S., 13 C. Cls., 195. That case was fully discussed on Appellant's Brief (pp. 9-12).

Appellees contend that this decision has been followed in a large number of cases, but they do not show that there was a single other case in which it was followed, from the date of the act of 1868 (now R. S., 1088) until 1896, when, motions having been filed simultaneously in the case at bar and other cases were allowed under the ruling now complained of and all of these cases are now pending, awaiting the decision of this court in the present appeal, brought to test the legality of the decision. The case in which the opin-

ion was written (McCollum *v.* U. S., 33 C. Cls., 469), could not be appealed because the amount involved was less than $3,000.

It is noticeable that in every case which has come before this court on appeal, where the provisions of the Revised Statutes, section 1088, were questioned, the action of the Court of Claims had been taken within the two-year period.

Ayers *v.* U. S., 9 Wall., 608.
U. S. *v.* Crussell, 12 Wall., 175.
Ex parte Russell, 13 Wall., 664.
Ex parte Roberts, 15 Wall., 384.
Ex parte United States, 16 Wall., 699.
Young *v.* U. S., 94 U. S., 258.
U. S. *v.* Young, 95 U. S., 641.
Belknap *v.* U. S., 150 U. S., 588.

We therefore submit that the facts do not sustain the contention that this statute has received a settled construction.

The Belloque Case (13 C. Cls., 195) was decided at the December term, 1877. The case of Young, assignee of Collie (Appellant's Brief, p. 7) was decided by this court on November 26, 1877. From that time until the action complained of in this appeal, we are not aware of any case in which the Court of Claims attempted to set aside a judgment under Revised Statutes, section 1088, more than two years after entry of judgment.

Mandatory or Directory.

Counsel for appellees, however, argues that although the statute authorizes the court to act *within two years*, the statute must be considered as directory merely, because the delay of the court ought not prejudice the right of the suitor.

In the present case this would be a moot question, because no delay is charged to the Court of Claims. The court could not with all diligence have disposed of the motion within two

years, because the motion was merely filed in the clerk's office and the application was not perfected for submission to the court for action within that period.

That statutes requiring action by a court or administrative officer within a fixed time are not merely directory, because the delay of the court or officer may prejudice or take away the rights of a suitor or applicant, is well settled.

Section 11 of the Act of March 3, 1891 (26 Stat. L., 829), creating the Circuit Court of Appeals, provides:

> "That an appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall not be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed."

In U. S. *v.* Baxter, 51 Fed. Rep., 624, the Circuit Court of Appeals held that although the writ of error was allowed in time by the acting circuit judge, it was, without fault of the district attorney, not actually issued by the clerk until after the expiration of the six months' period, and the appeal was therefore dismissed. Judge Sanborn, who delivered the opinion of the court, cited and relied on Scarborough *v.* Pargoud, 108 U. S., 567; Cummings *v.* Jones, 104 U. S., 419, and Mussina *v.* Cavazos, 6 Wall., 355, 360.

In City of Waxahachie *v.* Coler *et al.*, 92 Fed. Rep., 284, the whole subject was carefully reviewed. In that case the plaintiff in error had done everything required to be done on his part within the six months, but the writ had not actually been issued until four days thereafter. The opinion of the Circuit Court of Appeals, delivered by Judge Pardee, concludes:

> "Whether the failure to obtain and issue the writ in time resulted from the negligence of the plaintiff in error, or was the fault of the clerk, appears to be immaterial."

We have merely suggested this line of authorities to show the error of the contention that a statute should be held directory because it requires action to be taken by a court within a fixed period of time, and the inaction of the court or its officers may result in the deprivation of the right to proceed further in the litigation. Many other illustrations might be added.

Moreover, the two-year provision of section 1088 was intended to protect the citizen who has obtained a judgment against the United States against unreasonable delay in the payment thereof. As is well known, cases come before the Court of Claims where the property of a citizen has been appropriated to the public service in violation of the constitutional provision; where money due him is wrongfully withheld, and where delay in the obtaining of prompt reparation may result in great injury. Under the law he is not even entitled to the interest upon his judgment, which would be accorded between private parties.

To hold that the statute authorizes the defendants to file a motion for new trial within two years, without disclosing the evidence upon which it is based, and, as the appellees contend, without the right to have the motion considered for two years more, inflicts not only a loss of interest, but a possible loss of evidence whereby to meet the case upon the motion. Under the practice of the Court of Claims the claimant is denied the privilege of presenting counter-evidence (Henry *v.* U. S., 15 C. Cls., 162 (165).

As this court held in French *v.* Edwards, 13 Wall., 506:

> "When the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed, or the acts done will be invalid."

The Act of August 23, 1894 (28 Stat. L., 476).

It will be seen by an examination of the whole provision, of which a part only is copied on page 3 of Appellees' Brief, that this statute is merely a direction to the executive officers of the Government. It evidently contemplated an application to the Court under Revised Statutes, Section 1088. That section must have been before the Congress when the statute was prepared, as it employs in part the same language, authorizes a motion to be filed upon the same grounds, and at the date of its passage time remained for every one of the judgments appropriated for to be acted on within two years. This, it is further shown, was the construction put upon the act by the then Assistant Attorney General, whose motion (Record, page 6) is stated to be made "in accordance with the provisions of section 1088 of the Revised Statutes of the United States."

Third Assignment of Error—Amity and Treaty Stipulation to Pay Depredations Are Not Jurisdictional.

In their argument, under the "Third assignment of error" (Appellee's Brief, pages 23 to 33), the appellees contend that the present case was not an "allowed claim" in the Interior Department at the time of the passage of the Act of March 3, 1898, and, further, that as the defendant Indians were not in amity the Court of Claims had no jurisdiction over the case.

Amity.

Before discussing the facts of the particular case, we desire to advert to the rules defined by the courts as to what constitutes a jurisdictional question.

This subject was fully discussed in Noble *v.* Union River Logging R. Co., 147 U. S., 165 (173-4). Mr. Justice Brown, delivering the opinion of the court, said:

"It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common-law action (D'Arcy *v.* Ketchum, 52 U. S., 11 How., 165 (13; 548); Webster *v.* Reid, 52 U. S., 11 How., 437 (13; 761); Harris *v.* Hardeman, 55 U. S., 14 How., 334 (14; 444); Pennoyer *v.* Neff, 95 U. S., 714 (24; 565); Borden *v.* Fitch, 15 Johns., 141); the seizure and possession of the *res* within the bailiwick in a proceeding *in rem* (Rose *v.* Himely, 8 U. S., 4 Cranch, 241 (2; 608); Thompson *v.* Whitman, 85 U. S., 18 Wall., 457 (21; 897), a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged (Galpin *v.* Page, 85 U. S., 18 Wall., 350 (21; 959); Guaranty Trust & S. D. Co. *v.* Green Cove Springs & M. R. Co., 139 U. S., 137 (35; 116). So if the court appoint an administrator of the estate of a living person, or in a case where there is an executor capable of acting (Griffith *v.* Frazier, 12 U. S., 8 Cranch, 9 (3; 471), or condemns as lawful prize a vessel that was never captured (Rose *v.* Himely, 8 U. S., 4 Cranch, 241, 269 (2; 608, 617); or a court-martial proceeds and sentences a person not in the military or naval service (Wise *v.* Withers, 7 U. S., 3 Cranch, 331 (2; 457); or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In these and similar cases the action of the court or officers fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

"There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to

be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal court, which, when found by such court cannot be questioned collaterally (Des Moines Nav. & R. Co. *v.* Iowa Homestead Co., 123 U. S., 552 (31; 202); *Re* Sawyer, 124 U. S., 200, 220 (30; 402, 409); the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy (Michaels *v.* Post, 88 U. S., 21 Wall., 398 (22; 520); Betts *v.* Bagley, 12 Pick., 572); the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate (Comstock *v.* Crawford, 70 U. S., 3 Wall., 396 (18; 341); Grignon *v.* Astor, 43 U. S., 2 How., 319 (11; 283); Florentine *v.* Barton, 69 U. S., 2 Wall., 210 (17; 783); the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors (Thompson *v.* Tolmie, 27 U. S., 2 Pet., 157 (7; 381); and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties; but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are Hudson *v.* Guestier, 10 U. S., 6 Cranch, 281 (3; 224); *Ex parte* Watkins, 28 U. S., 3 Pet., 193 (7; 650); United States *v.* Arredondo, 31 U. S., 6 Pet., 691, 709 (8; 547, 554); Dyckman *v.* New York, 5 N. Y., 434; Jackson *v.* Crawford, 12 Wend., 533; Jackson *v.* Robinson, 4 Wend., 436; Fisher *v.* Bassett, 9 Leigh, 119, 131; Wright *v.* Douglas, 10 Barb., 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding. And even if the court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose (Simms *v.* Slacum, 7 U. S., 3 Cranch, 300 (2; 446)."

In Steel *v.* Refining Co., 106 U. S., 447 (451), the plaintiff's title depended upon a United States mineral patent.

The defense interposed was that the patent was void because, the land not being mineral land, the Interior Department had no jurisdiction to allow a mineral claim thereto. This court held that proof of the fact charged was inadmissible to attack the patent, the finding of the Land Department, although erroneous in fact, being conclusive except in a direct proceeding to vacate it, as authorized by the statutes.

In U. S. *v.* Winona & St. P. R. Co., 67 Fed. Rep., 959, Judge Sanborn, delivering the opinion of the Circuit Court of Appeals, said:

> "It is not difficult to determine whether the certificates issued in this case were void or voidable when tested by these rules. Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong (Foltz *v.* Railway Co., 8 C. C. A., 635; 60 Fed., 316, 318, and cases cited."

See also Dexter, Horton & Co. *v.* Sayward, 84 Fed. Rep., 296.

The question of amity is like any other question of fact submitted to the Interior Department or to the Court of Claims for determination incident to the allowance of a claim. In the award of the Department and judgment of October 11, 1892, in this case, the fact was found in favor of the claimant. Being merged into the judgment, it is like all other facts adjudicated thereby—the fact of the existence of a depredation, the citizenship of the claimant, the identity of the Indian defendants, etc.—finally determined unless proceedings are instituted to secure a reversal.

The question of amity as an incident of liability for Indian depredations was not an innovation by the Act of 1891.

It had been the requirement of the law governing allowances by the Interior Department. (See Rev. Stat., Sec. 2156.)

Amity was therefore one of the facts covered by the allowance of this case by the Department and which the Act of 1891 gave to the Attorney General the right to consider in determining whether or not the award would be reopened.

In this case the record shows that this very question was considered, that the fact of amity on the part of the defendant Indian tribe at the time of the depredation was stipulated by the counsel for claimant and defendants to be shown by the records, and that the Court of Claims accepted this stipulation of fact with the election not to reopen the award and entered judgment thereon.

We submit, therefore, that, so far as the question of amity is concerned, the argument made in our original brief under the "Third assignment of error" is equally applicable to the determination of this fact—that is, that the statute entrusted to the attorney for the defense the authority to elect to have judgment entered on the award of the Secretary of the Interior, unless *he*, the attorney for the defendants, elected to reopen the case, and that when he has in good faith entered into the stipulation found on pages 4 and 5 of the record, and judgment has thereupon been entered thereon, the court has not been invested with the power to examine into the qustion so determined, as has been attempted in this case.

Treaties With the Cheyenne Tribe.

But the appellees also contend that the allowance of the claim was beyond the jurisdiction of the Secretary of the Interior, because there was no treaty whereby they agreed to make compensation for depredations.

The direct answer to this contention is that the question raised is one of law, and the Court of Claims had no jurisdiction to entertain it under Revised Statutes, section 1088.

In re District of Columbia, 180 U. S., 250.

Relying, however, on the Mares Case, 29 C. Cls., 197, and the Labadi Case, 31 C. Cls., 205, it is contended that the treaty of October 14, 1864, did not authorize the allowance.

While we do not admit that the very narrow rule maintained by the court in these two cases is correct, particularly where it construes a statute pertaining to the jurisdiction of the Secretary of the Interior, who uniformly maintained a much broader construction, yet it is not necessary, we believe, to enter into a discussion of this question in the present case.

The award of the Secretary in this case is not in the record. It appears, however, that he allowed the claim against the "Cheyenne tribe or nation of Indians" for depredations committed in the summer of 1867. It does not appear what, if any, band or member of the tribe committed the depredation.

Where the jurisdiction of the Secretary is questioned, it must appear affirmatively that he did not have the right to make the award, and every reasonable intendment is in favor of his jurisdiction.

The treaty of 1865 does not purport to be entered into by the entire tribe. It purports to be a treaty with "the confederate tribes of Arapahoe and Cheyenne Indians of the Upper Arkansas River," and contains a stipulation (article 8) wherein the Indians, parties thereto, agree to "use their utmost endeavor to induce that portion of the tribe not now present to unite with them and accede to the provisions of this treaty."

Nothing appears to show that the others, members or bands, ever did join with those signing the treaty; nothing is here to show what bands were parties and what bands were not, excepting certain very interesting deductions which may be drawn by comparison of the signatures to this treaty and that of October 28, 1867 (15 Stat. L., 593).

It is a recognized rule of law that when the United States has entered into and recognizes a treaty, its validity cannot be questioned collaterally in such a proceeding as this. Yet

when a treaty as made, ratified, and proclaimed does not purport to be binding upon the whole tribe; when it recognizes the existence of others not party to it and not bound by it, it cannot be construed as obligatory upon those not present or represented unless it be shown that the conditions precedent to their liability have been fulfilled.

By a treaty with the whole Cheyenne tribe, preceding that of 1865—the Fort Laramie treaty of September 17, 1851—the Cheyenne tribe agreed to pay for depredations committed by any band or individual of their people. This treaty has been considered by the Court of Claims in the Moore Case, 32 C. Cls., 593, and held to constitute such a treaty provision for payment as authorized the allowance of claims by the Secretary.

Where, therefore, there was a treaty with the whole tribe agreeing to make compensation, and a later one with part of the tribe without this provision, we submit that an allowance was justified.

Respectfully submitted,

J. H. Ralston,
F. L. Siddons,
W. E. Richardson,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

JARIB L. SANDERSON, SURVIVING PARTNER of the firm of Barlow, Sanderson & Company, appellant,
v.
THE UNITED STATES ET AL. } No. 576.

MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the appellees in the above-entitled cause, and moves the court to advance the same on the docket and set it down for hearing on such day during the next term as shall be convenient to the court.

This is a case arising under the Indian depredation act, in which the Court of Claims rendered a judgment in favor of the claimant on the 11th day of October, 1892, for the sum of $7,740. Afterwards, and within two years from that date, a motion for a new trial was filed by the United States under the provisions of section 1088, Revised Statutes. This motion was allowed by the court after the expiration of more than two years

from the date of the judgment, and the claimant's petition was finally dismissed.

The question involved in the appeal relates to the construction of the statute under which the motion for a new trial was filed, the appellant contending that the Court of Claims has no power to allow such a motion after two years. There are a number of other cases, involving considerable amounts of money, the final disposition of which depends upon the decision in this case.

Opposing counsel concur in this motion.

HENRY M. HOYT,
Solicitor-General.

MAY, 1907.

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SANDERSON *v.* UNITED STATES AND THE CHEYENNE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

No. 208. Argued April 22, 23, 1908.—Decided May 18, 1908.

The provisions of § 1088, Rev. Stat., relative to new trials in Court of Claims cases are applicable to cases brought under the Indian Depredations Act of March 3, 1891, 26 Stat. 851.

The motion for new trial on behalf of the United States in Court of Claims cases under the provisions of § 1088, Rev. Stat., may be made any time within two years after final disposition of the claim, and, if so made, the motion may be decided by the court after the expiration of the two years period.

While ordinarily a court has no power to grant a new trial after the adjournment of the term if no application was made previous to the adjournment, the power so to do can be given by statute, and where a government consents to be sued, as the United States has in the Court

of Claims, it may attach whatever conditions it sees fit to the consent and give to itself distinct advantages, such as right to apply for new trial after the term, although such right is not given to claimants.

On the eighth of June, 1891, the appellant herein filed his petition in the Court of Claims, under the Indian Depredations Act, approved March 3, 1891, c. 538, 26 Stat. 851, to recover for losses of property sustained by the firm, of which, at the time of filing the petition, he was the surviving partner, from the depredations committed by members of a tribe of Cheyenne Indians in the year 1867, in or near the State of Kansas.

The petition contained the averments that the firm was at the time of the depredations engaged in the business of operating the Southern Overland Mail and Express Route, between the then terminus of the Union Pacific Railway and the city of Santa Fé, New Mexico, and was carrying the mails of the United States between those points.

Subsequently to such depredations two of the members of the firm died, and at the time of the filing of the petition the petitioner was left as the sole surviving partner.

The depredations were committed by taking unlawfully and by force or stealth from the possession of the firm, and in or near the State of Kansas, some thirty-seven mules and six horses, used by the firm in the operation of its business.

Under certain acts of Congress of March 3, 1885, c. 341, 23 Stat. 362, 376, and May 15, 1886, c. 333, 24 Stat. 29, 44, the claim of the firm for the recovery of the losses thus sustained was submitted to the investigation of the Secretary of the Interior, and, after investigation, the Secretary reported to Congress on December 7, 1886, finding that the firm had a just and equitable claim upon the United States for the amount of $7,740, the value of the animals as ascertained by the Secretary, who recommended the payment of that sum. Congress never appropriated anything for the payment of any part of the sum recommended. The amount awarded was not as large as the firm claimed was the value of the property de-

stroyed, but, for reasons stated in the petition to the court, it was not attempted to correct the injustice by reopening the question of the value upon the trial of the case before the Court of Claims.

The petition also contained an allegation that the tribe to which the Indians belonged who committed the depredations was at the time the loss occurred in amity with the United States.

After the filing of the petition the parties agreed on the facts, and, among others, it was agreed that the Indians took and destroyed the property belonging to the claimant without just cause or provocation, and that the Indians who took the property were members of the Cheyenne tribe, which was at the time of the commission of the depredations in amity and treaty relations with the United States.

The case was submitted to the court on the thirtieth day of June, 1892, and on the eleventh day of October, 1892, judgment was entered in favor of the claimant for the sum of $7,740, being the amount which had theretofore been reported to Congress by the Secretary of the Interior.

On the sixth day of October, 1894, the Assistant Attorney General filed in the clerk's office of the Court of Claims, while the court was in recess, a motion for a new trial in accordance with the provisions of § 1088 of the Revised Statutes of the United States, the ground of such motion being that in awarding judgment in favor of the claimant wrong and injustice had been done to the United States, because the defendant, the Cheyenne Indians, were not in amity with the United States at the time of the depredations which form the basis of the suit.

The Court of Claims on the thirteenth day of April, 1896, granted the motion for a new trial, and upon the new trial which was thereafter had the court found as a fact that at the time of the several depredations alleged in the petition the defendant Indians were hostile, and, as a conclusion of law, the court decided that the petition should be and the same

was dismissed, and judgment upon such finding and conclusion was entered in the court on the twenty-third day of April, 1906.

The claimant, on the seventeenth day of September, 1906, moved to vacate the judgment entered upon the new trial, and asked that the original judgment entered on the eleventh of October, 1892, should be reinstated and affirmed. The motion was denied, and on the twenty-fourth day of December, 1906, the claimant appealed to this court.

Mr. Jackson H. Ralston and *Mr. William E. Richardson*, with whom *Mr. Frederick L. Siddons* was on the brief, for appellant:

The Court of Claims had no power, under § 1088 of the Revised Statutes of the United States, to vacate a judgment by granting a motion for new trial four years after the judgment was entered.

The Supreme Court will review this issue on appeal from final judgment after the motion for new trial has been granted as it is only by means of such appeal that this court can act. *Young, Trustee*, v. *United States*, 94 U. S. (4 Otto) 258, and 95 U. S. (5 Otto) 641.

The Court of Claims made an erroneous ruling in the *Bellocq case*, 13 C. Cls. 195, which it relies upon to sustain the granting of the new trial in this case. The theory upon which the *Bellocq case* proceeded, namely, that in the absence of an express statutory prohibition, the Court of Claims may grant a motion for a new trial at any time, and that the statute in question, because it employs the term "may grant" within two years, does not forbid the granting of the motion after that period, was directly refuted by the opinion of this court in *Belknap* v. *United States*, 150 U. S. 588.

By the rule of the common law the trial court was required to dispose of the motion during the term. *Belknap* v. *United States*, 150 U. S. 588; *Buckner* v. *Conly*, 17 Ky. (1 T. B. M.) 3; *Truett* v. *Legg*, 32 Maryland, 149.

By examination of the judicial systems of many States, it is found that although the majority merely require the motion for new trial to be presented within a limited time, a large number have not fixed any time for the filing of the motion, but have statutes similar to the one under consideration, determining the period within which the court may grant a new trial.

The identical question raised here was decided in favor of appellants' contention in *Vaughan* v. *O'Connor*, 12 Nebraska, 478.

The principal other decisions in the several States having similar statutes upon this subject either requiring the motion to be determined within a fixed number of days, or within the term, or within the next succeeding term after judgment, all of which support the claimant's contention in this case, are as follows: *Ex parte Highland Avenue & Belt R. Co.*, 105 Alabama, 221; *Hundley* v. *Yonge*, 69 Alabama, 89; *Fitzpatrick's Admr.* v. *Hill*, 9 Alabama, 783; *Ruff* v. *Hand* (Arizona, 1890), 24 Pac. Rep. 257; *Walker* v. *Jefferson*, 5 Arkansas, 23; *Redman* v. *Reynolds*, 114 Indiana, 148; *Crews* v. *Ross*, 44 Indiana, 481 (487); *Hays* v. *May*, 35 Indiana, 427; *Ferger* v. *Wesler*, 35 Indiana, 53; *Buckner* v. *Conly*, 17 Kentucky, 3; *England* v. *Duckworth*, 75 S. Car. 309; *Clements* v. *Buckner* (Texas, 1904), 80 S. W. Rep. 235; *Lightfoot* v. *Wilson*, 11 Tex. Civ. App. 151; *S. C.*, 32 S. W. Rep. 331; *Laird* v. *State*, 15 Texas, 317; *McKean* v. *Zillner*, 9 Texas, 58.

It cannot be said that the appellant waived any rights by proceeding to trial after the granting of the motion for new trial. There was no right of appeal from the order, and it was his duty to participate in the new trial, and bring up this question on appeal from final judgment. *United States* v. *Young*, 94 U. S. 258.

Mr. Assistant Attorney General John G. Thompson, with whom *Mr. Lincoln B. Smith*, Assistant Attorney, was on the brief, for appellees.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The sole question in this case arises from the action of the Court of Claims in granting, upon the application of the Government, a new trial, April 13, 1896, more than two years subsequent to the entry of judgment in favor of the claimant on the eleventh day of October, 1892, although the application for such new trial had been filed October 6, 1894, which was less than two years after the entry of that judgment. The order was made under § 1088 of the Revised Statutes of the United States, which reads as follows:

"SEC. 1088. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

The motion was made pursuant to instructions contained in the act of Congress, approved August 23, 1894, c. 307, 28 Stat. 424, 476, which made appropriations to pay the judgments of the Court of Claims in this case, and 258 other Indian depredation cases. The provision in the last part of § 1 of that act is as follows:

"That no one of the said judgments shall be paid until the Attorney General shall have certified to the Secretary of the Treasury that he has caused to be examined the evidence heretofore presented to the Court of Claims in support of said judgment and such other pertinent evidence as he shall be able to procure as to whether fraud, wrong, or injustice has been done to the United States, or whether exorbitant sums have been allowed, and finds upon such evidence no grounds

sufficient in his opinion to support a new trial of said case; or until there shall have been filed with said Secretary a duly certified transcript of the proceedings of the Court of Claims denying the motion made by the Attorney General for a new trial in any one of said judgments."

The Attorney General examined the evidence therefore presented to the Court of Claims, and filed a motion for a new trial in this and many other cases. The motions in this case, and the others, were filed within two years from the dates of the respective judgments, but it is admitted that none of them was acted upon by the Court of Claims within that period. The Court of Claims was not in session when the statute of August 20, 1894, was passed nor when the motions for a new trial were filed in the clerk's office of that court, and it did not convene after the summer vacation until October 22, at which date more than two years had elapsed since the rendition of the judgment in this case.

It has been held by the Court of Claims (and, as we think, correctly) that § 1088 is applicable to the Indian Depredations Act of 1891 (26 Stat. 851). *McCollum* v. *United States*, 33 C. Cl. 469, 472.

The appellant contends that the statute must be so construed as to require the decision of the motion for a new trial within two years after the final disposition of the case, and hence that the motion should have been not only filed in the clerk's office, but decided by the court on or before October 11, 1894. The Government contends that as the motion was filed within the two years subsequent to the entry of the judgment, the court obtained jurisdiction over the motion, and it might be decided after the expiration of the two years. Upon the theory of the appellant the accident of an adjournment of the court some months *before* and its failure again to meet until a few days *after* the expiration of the two years subsequent to the entry of the judgment, deprived the court of the jurisdiction to hear and decide the question of the application for a new trial, although such application was

filed in its clerk's office within the two years limited by the statute.

Ordinarily a court has no power to grant a new trial after the adjournment of the term if no application has been made previous to the adjournment and no continuance granted. *Belknap* v. *United States*, 150 U. S. 588. This act, however, is a peculiar one. It grants distinct advantages to the United States. *United States* v. *Ayres*, 9 Wall. 608; *Henry* v. *United States*, 15 Ct. Cl. 162. These advantages Congress was competent to grant. The Government consents to be sued in regard to claims of this nature, and may attach such conditions to its consent as to it may seem proper. Among other conditions as to the finality of the judgments of the court it has empowered such court to grant a new trial on motion of the United States, pursuant to the section named.

The facts agreed upon on the first trial did not prevent the court from granting a new trial under that section. Indeed, the act of 1894, *supra*, really directs the court to grant a new trial if the facts are sufficient to bring the case within the provisions of § 1088.

We think the motion for a new trial may be made or filed at any time within the two years as provided for, and it is not necessary that the court should decide the motion within that time. If the Government has the whole two years in which to apply (and there is certainly nothing in the statute which limits the time to less than two years) it could not reasonably be held that an application made near the end of the two years must, nevertheless, be decided within that time. The motion might be filed at the last moment before the expiration of the two years, and if so, the court should have time to thereafter act upon it, or else the two-year limitation in which to file the motion is practically denied. If the motion must be decided within the two years, it must, of course, be filed sufficiently long before the expiration of that period to allow the court what it may regard as a sufficient time to decide it

intelligently within the limitation. How long that time may be it is impossible to say. It would be for the court to determine in each case. The result of such a construction is that there is no certain and definite time within which the motion for a new trial must be made, but it must be long enough before the expiration of the two years to give the court the time it may require in which to act upon the motion. This uncertainty we do not think was intended, nor is it the proper construction of the statute. When it limits the time to two years it is a limitation of the time for filing the motion and not a limitation of the time for making a decision, if the motion has been filed within the two years.

There is not much assistance to be obtained by referring to decisions of the state courts in relation to statutes of a somewhat similar nature, applicable to the ordinary law courts of the State. They depend very much upon the special language of the various statutes, all of which differ somewhat from the one under discussion. In addition to that, however, the peculiar nature of the Court of Claims itself must be considered. Congress created it for the sole purpose of permitting certain classes of claims against the Government to be presented to and passed upon by it, under the conditions which Congress might from time to time prescribe. The statute must therefore be so construed as to give full effect to such various conditions which Congress imposes upon the claimant for the privileges accorded him. A right on the part of the United States to move for a new trial should be so construed as not to limit the right by any technical or narrow reasoning, but the whole two years should be allowed in which to make the motion. Some States have enacted statutes limiting the time within which applications of this nature may be made, and they have been held complied with if the application is made within the time limited, although the decision is made subsequently. In other States the courts have regarded the time limitation as applicable to the time when the decision of the question submitted is rendered. We do not regard it as nec-

essary to cite them. The statutes differ, and the reasoning of the courts also.

The question of the construction of this particular act has heretofore been before the Court of Claims in *Bellocq* v. *United States*, 13 C. Cl. 195. The court there held that the limitation referred to the time of making the motion, and not to the time of its decision. We think the reasoning of Chief Justice Drake in that case is sound. See, also, *Mitchell* v. *Overman*, 103 U. S. 62; *McCollum* v. *United States*, 33 C. Cl. 469. Having two years in which to file its motion for a new trial the Government was in time in this case when it filed its motion with the clerk of the court, the court itself being then in recess, and it could thereafter hear and decide the case at its convenience.

The judgment of the Court of Claims dismissing the petition is

Affirmed.